TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946 47.

No. 1188 60

JOSEPH WHITE MUSSER, GUY W. MUSSER, CHARLES FREDERICK ZITTING, ET AL., APPELLANTS,

vs.

THE STATE OF UTAH

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

FILED MARCH 31, 1947.

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[fol. 1] [Caption and appearances omitted]

[fol. 2]

IN DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH

INFORMATION—Filed April 21, 1944

Brigham E. Roberts, District Attorney of the Third Judicial District, in and for Salt Lake County, State of Utah, accuses the above named defendants of the Crime of Conspiracy in violation of Section 103-11-1, Utah Code Annotated, 1943, and charges:

That the said above named defendants on and between the first day of June, 1935, and the first day of March, 1944, at the County of Salt Lake, State of Utah, did wilfully and unlawfully agree, combine, conspire, confederate and engage to, with and among themselves and to and with divers other persons to your affiant unknown, to commit acts injurious to public morals as follows, to-wit:

That the said above named defendants at the time and place aforesaid, did wilfully and unlawfully agree, combine, conspire, confederate and engage to, with and among themselves and to and with divers other persons to the District Attorney unknown, to advocate, promote, encourage, urge, teach, counsel, advise and practice polygamous or plural marriage and to advocate, promote, encourage, urge, counsel, advise and practice the cohabiting of one male person with more than one woman and in furtherance and pursuance of said conspiracy and to effect the object thereof, did commit the following overt acts:

1. That the said defendants from the first day of June, 1935, to the first day of March, 1944, at the County of Salt Lake, State of Utah, did publish and cause to be published once each month a pamphlet known as "Truth."

2. That the said defendants from the first day of June, 1935, to the first day of March, 1944, at the County of Salt Lake, State of Utah, did distribute and cause to

be distributed once each month, a pamphlet known as "Truth."

3. That the said defendants on the first day of July, 1942, purchased a house located at 2157 Lincoln Street in Salt Lake City, Utah.

4. That the said defendants from the first day of July, 1942, to the first day of March, 1944, made payments of money on the purchase price of a house located at 2157 Lincoln Street, Salt Lake City, Utah.

5. That the said defendants at divers times within Salt Lake County, State of Utah, between March 1, 1940 and March 1, 1944, did perform plural or polygamous marriage.

6. That the said defendants in Salt Lake County, State of Utah, between June 1, 1940 and March 1, 1944, did practice unlawful cohabitation, to-wit: the living of one male person with more than one women, or did aid and abet therein.

[fol. 3] 7. That the said defendants in Salt Lake County, State of Utah, between April 1, 1940, and March 1, 1944, did collect money.

8. That the said defendants at divers times from April 1, 1940 to March 1, 1944, did make speeches at meetings advocating the practice of polygamy, plural marriages and unlawful cohabitation.

9. That the said defendants at Salt Lake County, State of Utah, in 1942 and 1943, attempted to convert Helen Smith to believe in and to live in polygamy.

10. That the said defendants at Salt Lake County, State of Utah, in 1941, attempted to convert June Greenwood Waters Timpson to believe in and live in polygamy.

11. That in 1941 at the County of Salt Lake, State of Utah, the said defendants attempted to convert Leslie W. Brockelhurst to believe in and practice polygamy, plural marriages and unlawful cohabitation.

12. That in 1941 at the County of Salt Lake, State of Utah, the said defendants attempted to convert Gus-

tav A. Ponts to believe in and practice polygamy, plural marriages and unlawful cohabitation;

contrary to the provisions of the Statute of the State aforesaid, in such cases made and provided, and against the peace and dignity of the State of Utah.

(Signed) Brigham E. Roberts, District Attorney of the Third Judicial District in and for Salt Lake County, State of Utah.

[File endorsement omitted]

[fol. 4] In District Court of Salt Lake County

Motion to Quash—Filed May 5, 1944

Come now the defendants and move the Court (a) to quash the information; (b) to discharge the defendants; and (c) to exonerate their bondsmen, on the following grounds:

1

That the information does not charge the defendants with the commission of a public offense.

2

That the information contains a statement of matter which constitutes a legal justification of the offense charged.

(Signed) J. H. McKnight, Knox Patterson, Claude T. Barnes, Attorneys for Defendants.

Received copy this 5th day of May, 1944.
(Signed) Brigham E. Roberts, District Attorney.

[File endorsement omitted]

[fol. 5] In District Court of Salt Lake County

Order Denying Motion to Quash, etc.—September 5, 1944

Defendants' motion to suppress certain evidence and motion to quash comes now on for hearing, the defendants being present in person and represented by J. H. McKnight, Claude T. Barnes and Knox Patterson as counsels and

B. E. Roberts, and H. D. Lowry appearing in behalf of the State. Whereupon said motions are argued to the Court by respective counsel and submitted, and the Court being fully advised in the premises, orders that said motion to suppress is denied. It is further ordered that the said motion to quash is denied. Comes now Claude T. Barnes of counsel for defendant and enters a plea of not guilty and a plea of once in jeopardy for said defendants and each of them. Whereupon said case is set for trial on September 15, 1944. Comes now counsel for defendants and moves the Court for an order requiring the State to bring unto Court all of the exhibits and evidence, seized, and surrender all such evidence that does not have a bearing on said case, and said motion is denied.

[fol. 6] IN DISTRICT COURT OF SALT LAKE COUNTY

MOTION TO DISMISS AS TO ALL DEFENDANTS—Filed October 2, 1944

Come now the defendants named herein, and jointly make this their motion to dismiss this action at the close of the evidence offered by the State, the State having rested its case, and respectfully move the Court as follows:

That the above entitled action be now dismissed as against all of the defendants named therein.

For grounds for said motion the defendants rely upon the files and the record herein; the minutes of the above entitled Court, the laws of the State of Utah; the First and Fourteenth Amendments to the Constitution of the United States of America; Sections 4, 15, 24 and 27 of the First Article of the Constitution of the State of Utah, and the following statement, viz:

STATEMENT

The evidence now received herein, as at the close of the State's case in chief, is insufficient to warrant or to sustain any verdict of guilty as against these defendants.

No more has been shown by the evidence than a belief in a religious practice, dogma or theory.

The Court, or any jury, may not pass upon the morality or immorality of a religious practice.

Neither the Court, nor any jury, may pass upon the morals or immorality of a religious belief or dogma, or any exercise thereof.

Neither the Court, nor any jury, may pass upon the truth or untruth of any religious tenet or dogma, or religious exercise of the same.

J. H. McKnight, Claude T. Barnes and Knox Patterson, Attorneys for Defendants; By (Signed) Knox Patterson.

E. D. Hatch, of Counsel.

[File endorsement omitted]

[fol. 7] In District Court of Salt Lake County

Defendants' Requested Instructions to Jury

Instruction

XVI

You are instructed, gentlemen of the jury, that the advocacy of the truth of a religious doctrine, whether by an individual or a group acting in concert, constitutes no offense punishable by law.

Such cannot be found to constitute any criminal conspiracy.

Instruction

XXIV

You are instructed, gentlemen of the jury, that no hatred of government or advocacy of change in its laws, unaccompanied by force, and but expressed by public or private debate or discussion, can form any overt act evidencing any criminal conspiracy. (2 Bp. Cr. L. p. 125, Sec. 224.)

And, further: Where the subject of such debate or discussion, its morals, its truth, its desirability, its approval or command by the Almighty, and its entire subject is of religious faith or belief—such is absolutely immune from any prosecution whatsoever.

Further, such religious doings cannot be found to be any element of or any evidence of any crime or criminal conspiracy.

Defendants' Requested Instruction to the Jury

No. 36

You are instructed, Gentlemen of the Jury that:

The mere advocacy of a religious dogma, belief or practice, even though the same be prescribed by the civil law, constitutes no offense cognizable under our laws, or for which our laws may punish.

Hence, you may not consider in your deliberations any evidence upon that item of the alleged overt acts set out at [fol. 8] paragraph 8 of the same in the information.

Defendants' Requested Instruction to the Jury

No. 42

You are instructed, Gentlemen of the Jury, that this whole prosecution and the whole of the case arose out of and primarily involves a belief in a marriage type and form had on the one hand by the defendants and, on the other hand, denounced by a great majority of the general public, and in particular by the Church of Jesus Christ of Latter Day Saints, the so-called "Mormon Church".

The doctrine of marriage so believed by these defendants is an integral part of the alleged "command of God" contained in the "Doctrine and Covenants", a book of absolute truth as believed in by both these defendants and the said so-called "Mormon Church".

Being such, you are instructed that this case, inescapably, involves the Constitutional rights of freedom to believe and advocate a religious dogma, belief and faith, and that you must so give full consideration of the evidence in the light of the religious issues so in this case.

In such regard, you are further instructed that these defendants have full right to preach, advocate belief in, and denounce unbelievers in the religious doctrine of "celestial" —or polygamous—marriage as by them espoused and believed,—and to so do orally and in writing,—in private or in public,—in small assemblies or large gatherings of people generally.

That these defendants may have been here shown to have so done, under their right to so do as aforesaid, cannot be considered by you as in any sense being any proof of the charge here made against them, or any one of them.

{fol. 9} IN DISTRICT COURT OF SALT LAKE COUNTY

COURT'S INSTRUCTIONS TO THE JURY

Instruction No. 1

You are instructed that the defendants above-named are charged by the information in this case with the crime of conspiracy, in violation of Section 103-11-1, Utah Code Annotated, 1943, committed as follows, to-wit:

That the said above named defendants on and between the first day of June, 1935, and the first day of March, 1944, at the County of Salt Lake, State of Utah, did wilfully and unlawfully agree, combine, conspire, confederate and engage to, with and among themselves and to and with divers other persons to your affiant unknown, to commit acts injurious to public morals as follows, to-wit:

That the said above named defendants at the time and place aforesaid, did wilfully and unlawfully agree, combine, conspire, confederate and engage to, with and among themselves and to and with divers other persons to the District Attorney unknown, to advocate, promote, encourage, urge, teach, counsel, advise and practice polygamous or plural marriage and to advocate, promote, encourage, urge, counsel, advise and practice the cohabiting of one male person with more than one woman and in furtherance and pursuance of said conspiracy and to effect the object thereof, did commit certain overt acts.

Insofar as there is any competent evidence in support of the overt acts alleged they are as follows and are set forth in the information as follows:

First. That the said defendants from the first day of June, 1935, to the first day of March, 1944, at the County of Salt Lake, State of Utah, did publish and cause to be published once each month a pamphlet known as "Trath".

Second. That the said defendants from the first day of June, 1935, to the first day of March, 1944, at the County of Salt Lake, State of Utah, did distribute and cause to be distributed once each month a pamphlet known as "Truth".

Third. That the said defendants on the first day of July, 1942, purchased a house located at 2157 Lincoln Street in Salt Lake City, Utah.

Fourth. That the said defendants at Salt Lake County, State of Utah, in 1942 and 1943, attempted to convert Helen Smith to believe in and to live in polygamy.

Instruction No. 4

* * * * * * *

You are instructed that an agreement between two or [fol. 10] more persons to advocate, promote, encourage, teach, counsel, advise, and practice polygamous or plural marriages, and to advocate, promote, encourage, urge, counsel, advise, and practice the cohabiting of one male person with more than one woman is as a matter of law an agreement to do an act injurious to public morals, and if in addition thereto and pursuant to such an agreement said two or more persons do one or more overt acts in furtherance of said agreement, said acts being reasonably designed to further in any appreciable degree the accomplishment of the purpose of such agreement, the crime of conspiracy is made out.

Instruction No. 5

Before you can find the defendants, or any of them, guilty of the offense charged in the information, you must find from the evidence, beyond a reasonable doubt the following:

First: That on or between the first day of June, 1935, and the first day of March, 1944, at the County of Salt Lake, State of Utah, two or more of the defendants conspired, agreed and confederated among themselves to advocate, promote, encourage, teach, counsel, advise and practice polygamous or plural marriages and to advocate, promote, encourage, urge, counsel, advise and practice the cohabiting of one male person with more than one woman;

Second: That between April 21, 1941 and April 21, 1944, the date of filing of the information, at least one or more of the following overt acts was committed:

1. That the said defendants at the County of Salt Lake, State of Utah, did publish and cause to be published once each month a pamphlet known as "Truth".

2. That the said defendants at the County of Salt Lake, State of Utah, did distribute and cause to be distributed once each month, a pamphlet known as "Truth".

3. That the said defendants purchased a house located at 2157 Lincoln Street in Salt Lake City, Utah.

4. That the said defendants at Salt Lake County, State of Utah, attempted to convert Helen Smith to believe in and to live in polygamy.

[fol. 11] Third: That any one or more of the overt acts set forth in paragraph second hereof which you may find beyond a reasonable doubt was committed, was committed in furtherance of the agreement described in paragraph first hereof, and was reasonably designed to accomplish to some appreciable degree the object of said agreement, if any.

If the State has failed to prove to your satisfaction beyond a reasonable doubt any one or more of the foregoing items numbered first, second and third then you cannot convict the defendants, or any one of them.

Instruction No. 9

You are instructed, gentlemen of the jury, that religious belief may be had and entertained; may be discussed, both privately and publicly, by the believer; may be urged as true and moral; may be preached and expounded, all without any offense against the law.

The constitutional guaranty of religious freedom, however, does not go to the extent of cloaking anyone with immunity for the violation of any law of the State of Utah under a claim that such violation was pursuant to a religious conviction, however sincere.

[fol. 12] IN DISTRICT COURT OF SALT LAKE COUNTY

Bill of Exceptions

PROSPECTIVE JURORS—VOIR DIRE

The Court: Mr. McDonald, did you read about this case in the paper?

Mr. McDonald: Yes, sir.

The Court: Discuss it with others?

Mr. McDonald: Yes.

The Court: Express an opinion to others?

Mr. McDonald: Yes sir.

The Court: Express an opinion to others?

Mr. McDonald: Yes sir.

The Court: Have you got an opinion now as to the merits of the case?

Mr. McDonald: Yes sir.

The Court: Is your opinion based on anything other than newspaper reports and the common notoriety of the case? Do you have other sources of information?

Mr. McDonald: No. That is the only way—my opinion is based, on newspapers.

The Court: Do you now have an opinion about the case?

Mr. McDonald: Yes sir.

The Court: Well, do you think your opinion is such that it would disable you from being fair and impartial to both sides of the case, if you should be one of those selected to sit?

Mr. McDonald: It could be changed; as the case went on it could be changed.

The Court: Am I to understand, Mr. McDonald, if you felt the State failed to maintain the burden that I have said here they have got, of proving the defendants guilty beyond a reasonable doubt, you would feel they were entitled to acquittal and acquit them; is that right?

Mr. McDonald: Yes.

The Court: On the other hand, if you thought the State [fol. 13] had maintained that burden, and you were satisfied from the evidence here that the State had proved the defendants' guilt beyond a reasonable doubt, you would return a verdict of Guilty?

Mr. McDonald: Yes sir.

Mr. Barnes: We challenge for cause, if the court please, on the ground it would require evidence to change his opinion, whatever it is.

The Court: The challenge is denied.

Mr. Barnes: Take an exception.

The Court: Mr. Hollingshead, have you received any information of this case from sources other than newspapers and common gossip?

Mr. Hollingshead: No sir.

The Court: Did you ever express an opinion about the merits, to anyone?

Mr. Hollingshead: Probably have.

The Court: You don't remember now if you have or have not?

Mr. Hollingshead: I don't.

The Court: But you have discussed it?

Mr. Hollingshead: Yes.

The Court: Have you got an opinion at this moment about the merits of the case?

Mr. Hollingshead: I probably have.

The Court: Is it such an opinion, such an unalterable opinion, that it would not yield to evidence presented here in the case; that is to say, is it such a fixed conviction with you at this moment, that you feel that regardless of what the evidence was, you would follow the opinion you have now?

Mr. Hollingshead: I think I would be open minded.

The Court: And you would be fair to the State and fair to these defendants, and try the case on the evidence produced here in court, and shut out everything else?

Mr. Hollingshead: Yes.

Mr. Patterson: I would like to say upon the information we have from these last three jurors, we could not intelli- [fol. 14] gently exercise a challenge for implied bias or actual bias. We would like to know, if they have an opinion, whether someone would have to produce some evidence to remove that opinion.

The Court: I asked them that.

Mr. Patterson: I don't get it out of the court's examination. They start out with an opinion. Now, someone is at a disadvantage. I think we ought to know whether we, or the State——

The Court: I feel this way about it, Mr. Patterson: I don't see how any intelligent person can read a newspaper

article about anything without getting some kind of an opinion about it; and the law recognized that, and the State statute says that a juror is not disqualified because he has either formed or expressed an opinion, when that opinion is based solely upon newspaper accounts, or common notoriety, if he can go further and say that in spite of that opinion he can decide the case on the evidence and facts that are produced in court, and the law applicable thereto. Now, I think that correctly states it.

Mr. Barnes: We challenge this last juror for cause, if the court please, stated bias.

The Court: Have you a question of procedure there, Mr. Roberts?

Mr. Roberts: No, I don't. We resist the challenge.

Mr. Barnes: We take the position anybody that comes into this case as a juror, who is going to require evidence, one way or the other, to alter his opinion it is to the disadvantage of one or the other of us, either the State or ourselves.

Mr. Roberts: But then, if the juror says he has an open mind and can arrive at his verdict in accordance with the evidence and the instructions of the court, that is all any juror can do.

Mr. McKnight: That isn't what he said. Your Honor interrogated him to this point, if evidence were introduced, would you be willing to lay aside your opinion. If it takes evidence to remove his opinion, he is not eligible to sit as a juror. If he can come into court without hearing any evidence and have an opinion—if it takes evidence to change [fol. 15] that mind, he is not eligible. That is the law.

The Court: Not in this court, I am sorry to say. The challenge is denied.

Mr. Barnes: Exception.

The Court: Mr. Decker, have you heard about this case before coming to court?

Mr. Decker: Yes sir.

The Court: You read about it in the papers?

Mr. Decker: Yes sir.

The Court: Discussed it with others?

Mr. Decker: Yes sir.

The Court: Did you ever form an opinion about the merits of the case?

Mr. Decker: I couldn't very well help it. There is so much about the case down my way.

The Court: Did you ever express an opinion, that you recall now, about the guilt or innocence of these defendants?

Mr. Decker: It has been discussed to me. I took a mum part in it, I guess.

The Court: Mr. Decker, have you got an opinion at this time about the merits of this case?

Mr. Decker: Yes, I have.

The Court: The guilt or innocence of the defendants?

Mr. Decker: Yes.

The Court: Is it such an opinion that it would not yield to the facts presented here in the court room before you for your consideration, as a juror?

Mr. Patterson: Except to that question for this reason: If it would yield to the facts. If he has an opinion such as would require evidence to make him yield, that does not qualify the juror. Of course, we might be able to produce evidence to over-balance the opinion, but we should be able to start out here with a man whose mind is entirely unbiased [fol. 16] and has no opinion. And the question does not tend to qualify the juror.

The Court: I can't get blank minds for you, Mr. Patterson. These people have all read about this case, and I can't understand why anyone should contend that you could read about a case of this nature, or any case, or any newspaper article, without getting some opinion.

Mr. Patterson: Isn't that what we are entitled to, men whose minds will yield to evidence, regardless of any opinion they now have.

The Court: That is what I am trying to get.

Mr. Patterson: He tells you first he has opinion. In other words, if he is against us, we must first start out to remove that opinion.

The Court: Maybe he is against the State.

Mr. Patterson: I don't care which he is against.

The Court: I don't care, either. I cautioned the jurors not to state any opinions that they have. I want to know if they have got opinions, but I certainly don't want to know, and I don't want any juror to indicate he has an opinion for or against the defendants, or for or against the State, and I have carefully and purposefully avoided ascertaining what any of their opinions might be.

Do you think you can find the question I last asked Mr. Decker, Mr. Moulton?

Mr. Barnes: We challenge Mr. Decker for cause.

The Court: The challenge is denied at this time, Mr. Barnes. You may renew it when I get through talking with him, if you desire.

(Reporter read last question put to Mr. Decker.)

The Court: Is that question intelligible to you?

Mr. Decker: It would take evidence to change my opinion. Does that answer it? I have formed an opinion. I couldn't help it.

Mr. Barnes: We renew the challenge.

The Court: All right, Mr. Decker, I will ask you this other question: The opinion you now have—could the opinion you now have be removed by the evidence you heard in this court, and altered and changed?

Mr. Decker: Yes sir, by evidence it could.

[fol. 17] The Court: Am I to understand, then, you are willing to try this case upon the evidence heard in this court-room, and if you feel the State has proved the defendants guilty beyond a reasonable doubt to your satisfaction, you will convict them?

Mr. Decker: Yes sir.

The Court: And if you feel, after hearing all the evidence, and the court's instructions, that the State has failed to maintain that burden, that is, the burden of proving their guilt beyond a reasonable doubt, you will acquit them?

Mr. Decker: Yes sir.

Mr. Patterson: The answer to that question is "Yes". The juror nodded his head.

Mr. Decker: "Yes sir", I said.

Mr. Patterson: We except to both questions.

Mr. Roberts: Could this question be put: Is this opinion such as you could lay it aside and try this case fairly and impartially upon the evidence that is introduced, and render a verdict in accordance with that evidence and the instructions of the court.

Mr. Patterson: That question wouldn't be proper because it appeals to a man's prejudice.

The Court: I thought I covered that. I intended to. I may not have. I intended to, and I will endeavor to cover it now.

Is your opinion such, Mr. Decker, that you could lay it aside and consider this case upon the evidence presented here, and the instructions of the court, and finally render a fair and impartial verdict, based solely upon the evidence produced herein the court room?

Mr. Decker: By the evidence, yes sir.
Mr. Barnes: We renew our challenge for cause.
Mr. Roberts: We resist.
The Court: The challenge is denied.
Mr. Barnes: Exception.

. . . . . .

[fol. 18] The Court: Mr. Reed Arnold, have you read about the case before coming into court today?
Mr. Arnold: Yes sir.
The Court: Did you ever express an opinion to anyone about this case?
Mr. Arnolds: I wouldn't be surprised.
The Court: But if you did, you have no definite recollection of having done so, that is, at this time?
Mr. Arnold: No.
The Court: Is that a fact?
Mr. Arnold: That is right.
The Court: Have you any other source of information about this case other than the public press and the people talking about it?
Mr. Arnold: Yes sir.
The Court: Have you got an opinion at the present moment about the merits of this case?
Mr. Arnold: I think it is a fine case to try.
The Court: What?
Mr. Arnold: It would be a fine case to try.
The Court: I don't know what you mean by that. Have you an opinion as to whether or not these defendants are guilty or innocent of this change?
Mr. Arnold: I have no definite information on that.
The Court: I didn't ask if you had any information. I asked you if you have an opinion as to whether or not they are guilty or innocent. This is a serious business.
Mr. Arnold: Pardon me, Judge, if I appear flippant at all in the matter, Judge. I didn't intend to.
The Court: What do you think about it. Have you an opinion as to whether or not these defendants are guilty or innocent of this crime of which they are charged?
Mr. Arnold: I am—or I have, rather.
The Court: You have such an opinion. Is that opinion [fol. 19] of such fixity in your mind that you think it would not yield to the evidence produced here in court, even

though the evidence was contrary to the opinion which you now hold?

Mr. Arnold: No sir. I think I would be unbiased in the matter.

The Court: You think you could be fair and impartial?

Mr. Arnold: Yes sir.

The Court: To both the defendants and the State?

Mr. Arnold: Yes sir.

The Court: Now, you indicated you had some source of information other than the public press, or common gossip or notoriety.

Mr. Arnold: Probably, Judge, I should explain I am clerk in the Oquirrh Stake of Zion, and we occasionally have these things come up.

The Court: You are clerk where?

Mr. Arnold: Oquirrh Stake in the Church of Jesus Christ of Latter-day Saints.

The Court: That doesn't disqualify you. Nobody is going to be disqualified in this case because they are, solely because they are members of the L. D. S. Church. You might as well understand me now.

Mr. Barnes: I think the gentleman already stated he had already tried these cases in a church capacity.

Mr. Arnold: Mr. Barnes, you are wrong.

The Court: I am going to interrogate him further on that, Mr. Barnes.

Mr. Arnold, did you assist in the investigation of these cases in any way, or provide anyone with any information about them, or in any way participate in any of the activities leading up to the placing of this charge against these defendants?

Mr. Arnold: No sir. Would you restate the forepart of that question?

The Court: I say, did you assist in the investigation of these people?

Mr. Arnold: These people here?

The Court: These people, on the particular charge?

[fol. 20] Mr. Arnold: No sir.

The Court: Did you ever participate in any of your proceedings in your church where any of these people were involved?

Mr. Arnold: No sir, except indirectly.

Mr. McKnight: What does he mean where he got his information outside of the public press?

The Court: You are not going to be a witness in this case?

Mr. Arnold: No sir.

The Court: Do you know anything about this particular case, then, Mr. Arnold, and these defendants, the crime they are charged with, and this particular charge, other than you have read in the public press, and what you have heard discussed?

Mr. Arnold: Judge, I am not trying to get out of this jury service, if that is what you have in mind.

The Court: No; I don't mean to imply you are, since we understood each other.

Mr. Arnold: It so happens I am quite well acquainted with one who is related, by marriage, to one of these gentlemen, and I have heard him express his opinion.

The Court: And has that influenced you?

Mr. Arnold: I feel his word is just as good as any I know of.

The Court: We are kind of going around in a circle. Did I understand you correctly when you said apart from any information you might have now about these cases, that you, none the less, could be fair and impartial to these defendants and to the State?

Mr. Arnold: I think I could do that.

The Court: And if you are selected as one of these jurors, you could sit here and decide the case solely on the evidence produced in the court room, and the law applicable thereto?

Mr. McKnight: We challenge the juror for cause.

The Court: I don't think that challenge should be allowed.

[fol. 21] Mr. Roberts: The State resists that challenge.

The Court: I don't think it should be allowed. The challenge is disallowed.

Mr. McKnight: Exception.

CATHYRN LUCY COLLINWOOD COSGROVE.

Cross examination.

By Mr. Barnes:

Q. Mrs. Cosgrove, what is your full name.
A. Cathyrn Lucy Collinwood Cosgrove.
Q. Are you married now to Mr. Cosgrove?
A. I am.
Q. Where do you live?
A. San Diego, California.
Q. How long have you lived there?
A. Since June of this year.
Q. You have stated here that you attended various meetings at which these defendants were present. I will ask you if, at those meetings you heard what is commonly known as the Word of Wisdom taught?
A. I have heard it taught in meetings.
Q. What did you understand the Word of Wisdom to be?
A. I understood the Word of Wisdom to embrace the fact that there should not be smoking or drinking by the members of the church.
Q. And was that generally observed by the people you saw there?
A. Generally, but not entirely.
Q. Yes. And they were also taught to abstain from liquor?
A. Well, that is part of the Word of Wisdom, yes sir.
Q. And also tea and coffee?
A. Yes sir.
Q. Was it your observation among this group that quite [fol. 22] generally they observed that Word of Wisdom?
A. Well, there were quite a few smokers. I have seen them all drinking— not all of them, I should say, but I have seen a lot of them drinking, and most of them drank coffee, that I knew of.
Q. But generally their daily lives you observed that they did observe this Word of Wisdom?
A. Observed it to the degree that they felt they should observe it.
Q. They felt they should do it?
A. Or whatever they thought the Word of Wisdom applied to them.

Q. At these meetings, the group were taught chastity and virtue?

A. Yes sir.

Q. Were they taught it was an unpardonable sin for which the death penalty should be imposed if a man were unfaithful to his wife?

A. I wouldn't say the death penalty.

Q. Well, a very severe penalty should be imposed; is that correct?

A. I couldn't say to that.

Q. Did you hear something about a spiritual death penalty if such thing took place?

A. I don't ever recall a death penalty.

Q. You recall a penalty of some kind?

A. Yes sir.

Q. Were they taught Christianity in these meetings?

A. Yes sir.

Q. And honesty?

A. Yes sir.

Q. And uprightness?

A. Yes sir.

Q. Were they taught prayers, to be prayerful?

A. Yes sir.

Q. Did they habitually, in the families you visited, have family prayers?

A. Yes sir.

Q. Were the children made to say their prayers before they went to bed?

[fol. 23] A. I imagine so. I never had that in the family I was in. The children weren't big enough.

Q. Did they open their meetings with prayer?

A. Yes sir.

Q. And closed them with prayer?

A. Yes sir.

Q. And in their meetings did they use the long established Mormon hymn books?

A. Yes sir.

Q. No other hymn book?

A. Yes, they had one other book that they sang from.

Q. You refer to a Sunday School hymn book?

A. I refer to the Sunday School hymn book and also a book with a green cover that they sang from.

Q. But that is called the Hymn Book of the Church of

Jesus Christ of Latter-day Saints, commonly called the Mormon Church?

A. I had only seen the book in the group, so I hadn't seen it at any other church.

Q. Do you know what is known as the M.I.A. Song Book of the Mormon Church?

A. I have heard of it, yes.

Q. Was that used?

A. I do not recall.

Q. At any rate, it wasn't the hymn book published by these people?

A. No sir.

Q. Were they taught the principle of Faith in God?

A. Yes sir.

Q. Were they taught the principle of Repentence of One's Sins?

A. Yes sir.

Q. Were they taught the principle of Baptism by Immersion for the forgiveness of Sins?

A. Yes sir.

Q. Were they taught, and I refer to the children and of the group, were they taught the Atonement of Christ?

[fol. 24] A. Yes sir.

Q. And why Christ came onto this earth?

A. Yes sir.

Q. Were they taught the Book of Mormon was the divine word of God?

A. Yes sir.

Q. Were they taught the Doctrine and Covenants was the divine word of God?

A. Yes sir.

Q. Were they taught concerning Christ's first coming on the earth?

A. Yes sir.

Q. And of His second coming?

A. Yes sir.

Q. And that they might look forward to the millennium when He would reappear?

A. Yes sir.

Q. Were they taught concerning the United Order?

A. Yes sir.

Q. And "United Order," by that you refer to a condition in which people live more or less together and share property, share their woes with their happinesses, together?

A. Yes sir.

Q. And you stated that they were taught the principle of tithing?

A. Yes sir.

Q. Were they taught concerning the Twelve Apostles as of old and the present Twelve Apostles?

A. We knew of their existence and we knew they were there in the church proper, but they didn't follow them.

Q. You were taught the original Twelve Apostles of Christ's Church?

A. Yes.

Q. Were you taught of the patriarch of old?

A. Yes sir.

Q. Were you taught that men on this earth have their free agency?

A. Yes sir.

Q. And that they were given the privilege, by the Lord, [fol. 25] to choose between good and evil?

A. Yes sir.

Q. And that they should choose the good?

A. Yes sir.

Q. Were they taught the principle of Revelation, that the Lord is now speaking through His Priesthood here on earth and giving His voice to the people?

A. Yes sir.

Q. They were taught that that is the living principle of Christianity; is that right?

A. That is right.

Q. Were they taught of the Gathering of Israel?

A. Yes sir.

Q. In the last days. As a matter of fact, these references to plural marriage were very incidental, were they not, Mrs. Cosgrove?

A. No sir.

Q. Were they taught concerning the Godhead and the Father and the Son and the Holy Ghost?

A. Yes sir.

Q. And that permeating everything is the spirit of the Lord and the Holy Ghost throughout all matter?

A. Yes sir.

Q. Were they taught the life of Joseph Smith as a Prophet of God?

A. Yes sir.

Q. Were they taught that the Bible is a divine work of the Lord?

A. In so far as it is translated correctly.

Q. In so far as it is translated correctly. And, by the way, those are the exact words of the teachings of the Prophet Joseph Smith; is that correct?

A. Yes sir. They also used the Bible of the Re-Organized Church.

Q. You are familiar with the Articles of Faith that are put out by the Prophet Joseph Smith?

A. I have studied them.

Q. In which those words appear?

A. Yes sir.

Q. "We believe in the Bible, we believe in the Word of [fol. 26] God so far as it is translated correctly."

A. Yes sir.

Q. And they were taught that?

A. Yes sir.

Q. Were they taught the principle of laying on of hands for the healing of the sick?

A. Yes sir.

Q. Is there in this room one man whom you saw cured by the laying on of hands of paralysis?

Mr. Roberts: Object to that as immaterial, irrelevant, a conclusion, and not proper cross examination.

The Court: Objection sustained.

Q. One of the defendants.

Mr. Roberts: We object to that as being immaterial, irrelevant and not proper cross examination.

The Court: Objection sustained.

Q. Were they taught concerning the priesthood and the various officers and offices of the priesthood?

A. Yes sir.

Q. Were they taught to take the sacrament as a figurative representation of the Lord's atonement, and so forth?

A. Yes sir.

Q. Did they regularly have the sacrament in their Sunday School meetings?

A. No sir; the sacrament was once a month.

Q. Once a month. That was the sacrament meeting; is that right?

A. Yes sir.

Q. Were they taught concerning the resurrection and the belief in the resurrection?

A. Yes sir.

Q. That all men would be resurrected?

A. Yes sir.

Q. And that they would be judged in the hereafter in [fol. 27] accordance with their deeds here on earth?

A. Yes sir.

Q. And those who had done evil would be punished accordingly?

A. Yes.

Q. Those who had done good would receive higher glory than those who had done evil?

A. Yes sir.

Q. Were they taught to observe the Sabbath Day and keep it holy?

A. They were taught it, yes sir.

Q. Did these meetings occur on the Sabbath Day?

A. Some meetings occurred on the Sabbath Day.

Q. Were they taught concerning work in the Temples of the Lord?

A. Well, they were taught concerning it, but they didn't do such.

Q. Were they taught that on this earth are certain individuals who have never had the privilege of listening to the gospel of the Lord; were they taught that, and that others had died who had never had that privilege; is that right?

A. Yes.

Q. And that there would be such a thing as baptism for the dead?

A. Yes.

Q. And that by reason of that baptism those who had passed away without the privilege of hearing the Lord's word would have it taught to them in Paradise?

A. They were taught that, but they did not do it.

Q. Yes, but they were taught that?

A. Yes sir.

Q. Were they taught that the Pearl of Great Price was the word of the Lord?

A. Yes sir.

Q. And that is another book written by the Prophet Joseph Smith?

A. That I couldn't say.

Q. Were they taught to study the geneology of their ancestors, so that those who had died without receiving knowledge of the word of the Lord could be baptized for by living people?

[fol. 28] A. They were taught that the last few months I was in the group.

Q. That is what you refer to by the "Geneology Class"; is that right?

A. Yes sir.

Q. Now, you were a member of the Mormon Church before you met Cleveland?

A. Yes, I was.

Q. Where were you born?

Mr. Roberts: We object to this as immaterial, irrelevant and not proper cross examination.

The Court: Objection overruled.

Q. Go ahead?

A. I was born in Garfield, Utah.

Q. Of Mormon parentage?

A. Yes sir.

Q. Then you had been familiar all your life with these books that they mentioned; is that right?

A. Some of them.

Q. You mentioned a book called Celestial Marriage by Musser and Broadbent, that was read to you by Mr. Cleveland. I show you a book, and do you recognize it. Is that the book?

A. This is three books.

Q. Yes, three books.

A. The book I had read to me was a very small book, and it was Fred's own book. It was just Celestial Marriage.

Q. Celestial Marriage. And that is the first one here. Is this it here?

A. Yes sir.

Q. Did Fred read this to you, and I am only going to read a short statement; being an extract from a discourse by Orson Pratt, delivered at a Semi-Annual Conference, October 7, 1874, reported in the Journal of Discourses, Volume 17, Page 223:

> "Why do Latter-day Saints Practice Polygamy: This is a plain question. I will answer just as plainly. It is because we believe with all the sincerity of our

hearts, as has been stated by former speakers from this [fol. 29] stand, that the Lord God who gave revelations to Moses approving polygamy, has given revelations to the Latter-day Saints not only approving it, but commanding it, as He commanded Israel in ancient times.

"Now having said so much in relation to the reason why we practice polygamy, I want to say a few words in regard to the revelation on polygamy. God has told us Latter-day Saints that we shall be condemned if we do not enter into that principle, and yet I have heard, now and then, a brother or sister saying, 'I am a Latter-day Saint, but I do not believe in polygamy.' Oh, what an absurd expression, what an absurd idea. A person might as well say 'I am a follower of the Lord Jesus Christ, but I do not believe in Him.' One is as consistent as the other. Or a person might as well say 'I believe in Mormonism and in the revelation given through Joseph Smith, but I am not a polygamist, and I do not believe in polygamy.' What an absurdity. If one portion of the doctrine of the Church is true, the whole of them is true."

Is that what he read to you?

A. I know that he has read it to me, but whether or not he read it that night, I couldn't tell.

Q. You know he has read it to you on various occasions?

A. Oh yes.

Q. Now, you stated that he read and talked to you from the Doctrine and Covenants; is that right?

A. No; I said the Book of Mormon.

Q. Well, but you just now said they taught the Doctrine and Covenants?

A. Oh, yes sir.

Q. That is right. I show you what is called the Doctrine and Covenants, published by the Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah. And this book is dated 1943. Is that right?

A. That is what it says.

Q. That is what it says. I want to read one or two verses of this and ask you—by the way, to your knowledge how long [fol. 30] has this been published and available to the public?

A. I wouldn't know.

Q. Ever since you were a little child?

A. Oh yes.

Q. In fact, you can remember it when you were a little girl?

A. Yes sir.

Q. At home?

A. Yes sir.

Q. And you have seen it, off and on, ever since?

A. Yes sir.

Q. All right. This is dated 1943, this one. Let me turn to Section 133. I want to read one verse from that, and you might see if I am reading correctly. I mean 131. Now, follow me, will you.

"In the Celestial Glory there are three heavens or degrees;

"And in order to obtain the highest, a man must enter into this order of the priesthood meaning the new and everlasting covenant of marriage;

"And if he does not, he cannot obtain it."

Did they teach you that?

A. Yes sir.

Mr. Roberts: "They," I am wondering.

Mr. Barnes: This group, in these meetings.

Mr. Roberts: These defendants.

Q. They taught you this?

A. It was mostly taught to me by Fred, at home.

Q. Mostly by Fred, at home?

A. Yes.

Q. And Fred read this book, then?

A. Yes sir.

Q. Section 132:

"1. Verily, thus saith the Lord unto you my servant Joseph, that inasmuch as you have inquired of my hand [fol. 31] to know and understand wherein I, the Lord, justified my servants Abraham, Isaac and Jacob, as also Moses, David and Solomon, my servants, as touching the principle and doctrine of their having many wives and concubines—

"Behold, and lo, I am the Lord thy God, and will answer thee as touching this matter.

"Therefore, prepare thy heart to receive and obey the instructions which I am about to give unto you; for all

those who have this law revealed unto them must obey the same.

"For behold, I reveal unto you a new and everlasting covenant; and if ye abide not that covenant, then are ye damned; for no one can reject this covenant and be permitted to enter into my glory.

"For all who will have a blessing as my hands shall abide the law which was appointed for that blessing, and the conditions thereof, as were instituted from before the foundation of the world.

' And as pertaining to the new and everlasting covenant, it was instituted for the fulness of my glory; and he that receiveth a fulness thereof must and shall abide the law, or he shall be damned, saith the Lord God."

Is that what they read to you, Mr. Fred?

A. Yes.

Q. Let us go over here to paragraph 64 of the 132nd Section concerning a wife:

"And again, verily, verily, I say unto you, if any man have a wife, who holds the keys of this power, and he teaches unto her the law of my priesthood, as pertaining unto these things, then shall she believe and administer unto him, or she shall be destroyed, saith the Lord your God; for I will destroy her; for I will magnify my name upon all those who receive and abide in my law."

Did Fred read that to you?

A. Yes sir.

Q. Fred didn't print this book, did he?

A. No sir.

Q. And the book, so far as you know, has been published [fol. 32] ever since you were a girl?

A. Yes sir.

Q. In Salt Lake City?

Mr. Patterson: What was the date of the publication of that book?

Mr. Barnes: 1943.

Mr. Patterson: By whom?

Mr. Roberts: We object to that.

By Mr. Barnes:

Q. I will ask you if this book, on its front page says, "Published by the Church of Jesus Christ of Latter-day Saints,

Salt Lake City, Utah, United States of America, 1943;" is that right?

A. Yes sir.

Mr. Barnes: That is all.

* * * * * * *

HELEN G. SMITH.

Direct examination.

By Mr. Roberts:

Q. Before this time, had you had any discussion with your husband in connection with plural marriage?

A. No.

Mr. Patterson: Object to it, your Honor. Limited by the Statute and the Constitution, the wife testifying against her husband.

Mr. Roberts: She isn't testifying against her husband.

Mr. Patterson: The husband is not on trial?

Mr. Roberts: That is right.

Mr. Barnes: The husband is one of the defendants.

Mr. Roberts: He is in the Armed forces, and the court heretofore entered an order that he and one other defendant——

Mr. Patterson: It has been dismissed?

Mr. Roberts: No, it hasn't been dismissed.

Mr. Barnes: Can't help it. It is the same thing if the court please.

[fol. 33] Mr. Patterson: Whether the husband is on trial or not she can't get up here and deride his character and testify against him.

Mr. Barnes: He may be on trial.

Mr. Roberts: That is his privilege.

Mr. Lowry: It is not the attorney's privilege.

Mr. Barnes: We represent him. I represent him.

Mr. Patterson: She isn't permitted to testify. It isn't a matter of consent. It is against public policy.

Mr. Barnes: I speak for him as his attorney.

The Court: The basis for the rule, gentlemen, is to preserve inviolate confidences between man and wife during marriage relations.

Mr. Roberts: That isn't the privilege they contend for.

The Court: That is the privilege.

Mr. Roberts: The Constitution provides a wife shall not testify against her husband, or a husband against a wife. She is not testifying against her husband. The husband is not on trial.

The Court: He may be on trial.

Mr. Roberts: Some day, but when that time comes he can raise that privilege, and, of course, she will not be permitted to testify against him.

Mr. Barnes: I raise it now, as his attorney.

Mr. Roberts: This testimony can't be used against him, if he claims the privilege.

Mr. Barnes: It will be used against his character.

The Court: Isn't the basis and the reason for the rule, Mr. Roberts, as I stated, and if that is the reason, then isn't it violated if she is permitted to testify here, or what is your view?

Mr. Roberts: My view is it is only a privilege the husband could contend for when he is a party to the lawsuit.

The Court: Well, that is right, but this is certainly a unique situation. I don't suppose it has ever arisen before.

Mr. Roberts: But he is not a party to this suit, at the present time.

Mr. Patterson: The purpose of the Statutes and the Con-
[fol. 34] stitution is to protect the marriage relations, that they may remain inviolate.

The Court: In the beginning of this case the court directed a severance of the trial of these two people. It wasn't a dismissal.

Mr. Lowry: That is right.

The Court: What is the status of these two defendants?

Mr. Lowry: They are not even before this court. Smith isn't. He has never been arraigned in the City Court. He has never been bound over.

Mr. Roberts: There is this, too, in connection with it. He is shown as a conspirator in this case. I think then any act which he does or any declaration he makes which are in furtherance of this conspiracy is admissible against all members of the conspiracy.

The Court: Yes, but that doesn't get you around the privilege, does it, Mr. Roberts?

Mr. Roberts: The thing that eliminates the privilege in this case is the fact he is not on trial.

The Court: He is not a party to this action.

Mr. Roberts: That is right, and this testimony is not against him.

The Court: I certainly want to be right about this.

Mr. Patterson: If her husband were not a defendant at all, never lived the life at all, why she couldn't get up and testify against him.

The Court: The statute says neither the husband nor the wife shall be a competent witness for or against the other in a criminal action or proceeding to which one or both are parties, without the consent of the other. And there are certain exceptions.

Mr. Barnes: If the court please, he is a party to this proceeding.

The Court: I think the expression "proceeding" there is used in the sense "the particular action." I am going to resolve the matter in favor of the State and permit her to testify.

Objection overruled.

Mr. Barnes: Exception.

[fol. 35] HELEN G. SMITH.

Cross-examination.

By Mr. Barnes:

Q. Were you born a member of the Latter-day Saints Church?

A. Yes, I was.

Q. And you have made some mention here of a conversation—no, not a conversation, a statement made by Joseph Musser at this meeting, where I think you stated your sister-in-law had remonstrated with them concerning your husband; is that right?

A. Yes.

Q. You stated part of that statement. You didn't attempt to state it all, did you?

A. I don't know what you mean.

Q. You didn't attempt to give all that Mr. Musser said?

A. Oh no, I didn't tell everything he said.

Q. That is right. Do you know the lady sitting at the end, who is now taking shorthand notes, Myrtle?

A. Myrtle Allred.

Q. Yes. You know who she is?

A. Yes.

Q. Was she there at that time?

A. I don't remember seeing her at that time. She could have been there.

Q. Yes. Generally took shorthand notes of these meetings; is that correct?

A. I didn't ever see her take shorthand notes.

Q. Now, I am going to read this statement to you, purporting to be——

Mr. Roberts: Just a minute. If doesn't purport to be anything and I object to that language.

Mr. Barnes: I will withdraw that.

Q. I am going to read this statement to you, and you indicate to me if it isn't exactly what Mr. Musser said on that occasion, will you do that?

A. How can I remember if it is exactly what he said?

Q. Use your best memory, that is all:

[fol. 36] "I do not wish to say anything that will tend to create feelings of animosity. The Gospel of the Lord Jesus Christ is broad enough and roomy enough for the spirit of peace, good-will, love, charity, and all the attributes of God to dwell in. We have had placed——"

Mr. Roberts: I object to a question so long, your Honor. I think it could be cut up and asked, "Did he say that," instead of going through the whole thing.

Mr. Patterson: Ask her if he said that much of it.

Mr. Barnes: I am asking her to stop me——

A. Yes, that sounds right.

Q. You stop me when it doesn't.

"We have had placed before us today two thoughts and, so far as I know, both have emanated from minds that are pure and desirous of accomplishing good. My only purpose in life is to live the law which the Lord Jesus Christ has given. I care not for man's laws when they conflict with the laws of God. I know there are some among us—many in our own Church (the Church of Jesus Christ of Latter-day Saints)—who hold that the law of the land, the law of man, must be observed

in preference to the law of God, when the two conflict. That theory is held by many of our good people—many of our leading people. In fact the 12th Article of our faith indicates that we believe in being subject to kings, rulers, presidents, etc., in obeying, honoring, and sustaining the laws. By some this Article is placed before and above all the other Articles of Faith, and many of the Saints justify the putting away of principles of life and salvation on the authority of that one Article. Other and companion Articles are forgotten; for instance No. 11—'We claim the privilege of worshipping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where or what they may.' That expresses our feelings.

"I don't feel that it is just right to come here to pick a young man to pieces as has been attempted today. Suppose this young man has been a little reckless ... his younger days. Perhaps he has not been more so than [fol. 37] I myself. I don't know his former life, but I do believe in the power of repentance and in the forgiving grace of *of* Almighty God. Then, again, when we speak as our sister has done, of a religion that divides families and breaks the hearts of loved ones, I have an idea that this young man's father went to Europe or in some other part of the Lord's vineyard to labor as an ambassador of Christ, and that he then taught the same Gospel that we are preaching here today and which separated families—separated husbands from wives and wives from husbands and children from parents as a consequence of some embracing the unpopular doctrines of Mormonism.

"I am speaking only in general terms. I taught the Gospel of the Lord Jesus Christ in the South, and when a certain man received it and was baptized his wife wanted nothing more to do with him. I remember reading in history that when Heber C. Kimball came West with the Mormon pioneers, one of his wives, wanting nothing to do with Mormonism, remained in the East. She left him.

"I recall another instance in history—that when Brigham Young advised Joseph F. Smith to enter the order of plural marriage his wife told him she would leave him if he did; and she did leave him because he

took another wife, and another, and another, and another: Why did he do it? Because he had been counseled to do it by the Prophet of God, Why did the Prophet counsel him to do it? Because it is a principle of life and salvation. It was necessary for him to embrace that principle if he wanted the blessings he was after—the blessings of Abraham; if he wanted to go into the presence of Abraham, and finally into the presence of God the Eternal Father.

"To go where God is and become a joint heir with Jesus Christ, one must live the law that God and Christ are living, and President Smith did this as a young man. Yes, a woman's heart was broken. She went to California and, so far as I know, they never met again in life. But they will meet. This is only the beginning of eternity. They will meet again, and if that woman is ever exalted it will be through the Priesthood of God [fol. 38] held by Joseph F. Smith, and I believe with all my heart that she will be exalted.

"I recall a statement ascribed to the Prophet Joseph Smith, when his wife Emma opposed him and sought to hinder him from going on with some work he had been appointed to accomplish. He said he loved Emma and he would have her even though he might have to go into hell to save her. That sounds rather harsh to modern ears, I know, but hell simply means the state that isn't heaven; and a woman who destroys, or tries to destroy the Priesthood of her husband and rebels against him when he is faithful to the laws of God, will have to go into that state and be redeemed before she can be exalted.

"These are facts. We cannot change them. We haven't a spirit of animosity toward any person in this house today. I believe I am as free from hatred as a man can be under the circumstances. I love this young man who has been mentioned and severely chided by his sister. I love his testimony; it was an honest testimony. I didn't proselyte him—Brother Barlow didn't proselyte him to the belief he now entertains. He caught the light and came in among this group of Saints through the promptings of the Spirit of the Lord. We are not an organized group. It is a group of people that meet occasionally in prayer and supplication and

the exchange of ideas in order that they might get nearer to the Lord and have a better understanding of the principles of life and salvation. There is only one Church in the world approved of the Lord, and that is the Church of Jesus Christ of Latter-day Saints—the Church we adhere to in our faith; but since some of us are not welcome in the various church houses, we meet here and in other places until such time as the Lord returns order to His house as He has promised to do (D. & C. Sec. 85).

"We know, the Church knows, the leaders know and some of them have confessed in my hearing that the Church is out of order; that it is not living up to the high ideals and principles of life and salvation that Joseph revealed and established under the direction of the Lord. We all know that. We all know that the Church has been driven into the wilderness. Why? Because [fol. 39] the people have apostatized—ceased living the high and holy principles revealed to us through the Prophet Joseph Smith. What are these principles? One of them is the law of Gathering. We abandoned that law years ago, and as a result we have saints all over the world fighting and seeking to kill each other, and this because we wouldn't let them gather to Zion.

"There is the law of the United Order which the Saints left, and cannot live today because of selfishness; but we have got to live it before we can accomplish the mission resting upon us.

"Then the law of Celestial marriage that gives me, if I am faithful, the right to have my children and wives throughout eternity. We gave it up for statehood and to become as other people. We did it voluntarily. Our leaders sent a petition to the President of the United States, stating that in order to be in harmony with our own fellow citizens, we would voluntarily give up this principle that we had always taught was necessary to a complete salvation and exaltation.

"Well, this little group of people are not converted to that serfdom. We believe in following our leaders insofar as they follow the revelations of the Lord and we have a right to that belief. We have our agency. Before we ever came in the flesh the war in heaven was predicated on this principle of agency. Lucifer said, 'I will save them all; I will force them to do right, I will

take their agency from them and none will be lost, but give me your honor'. The Lord Jesus said, 'Father, Thy will be done. I will go down and give my life; I will redeem the human family from the consequences of the fall, and they will still retain their agency to individually work out their salvation'.

"It is a question of agency. These people here today are exercising their agency in being here. I am exercising my agency in talking to you, and if I say anything that is not correct your agency gives you the right to reject it—it is me and not you to blame. I am exercising that agency which we came into mortal life with and are privileged to sustain and support.

"This young man is a man of God, if my impressions [fol. 40] are correct. Why do I know it? Because he has the spirit of the Lord with him. I have talked with him on many occasions, and he has manifested the Spirit of the Lord. I am not mixed up in his family affairs. I know his mother feels very badly; we have seen it. One of the sisters here said, 'Christ came not with peace but with a sword.' Why a sword? The sword of truth to separate the wicked from the righteous. That is what God's law does. Christ was full of humility, love, kindness, and charity, but the doctrine which he brought with him (and it was the doctrine of the Gods) was what formed the sword that destroys the wicked and brings to naught those that are trying to destroy the lives of good men and women.

"We are at war; we have always been at war. There has been a war ever since the days of Father Adam. You, brothers and sisters, are soldiers of this war; you have enlisted in the conflict to combat error, and it is your duty—it is the duty of every man and woman to stand for right and righteousness; fight for the right of agency.

"There are no more free women in the world than Latter-day Saints women. I have heard the charge time and again how Mormon women were enslaved and ruled over by their brutal husbands. I used to smile at some of the people of the Southern states when on a mission among them—to see women go into the fields and work by the side of their husbands, and at noon while the men folks were napping the women would nurse their babies, get dinner, and then return to the

fields with the men; and some of them in their ignorance would talk about our women in the West being slaves. There never was a freer set of women in the world than those of the Latter-day Saints. They don't have to accept plural marriage. Every normal woman has a right to a husband.

"Collier's Weekly, a couple of weeks ago, published an article showing that now one woman in seven has no chance under the monogamic system to marry; and as a consequence of the present war the article predicts there will be millions of women who cannot obtain husbands. Who has a right to say these surplus women cannot marry and become mothers? Who has that right? Man hasn't; the government hasn't. It is an [fol. 41] inherent right and only God can stop it.

"Here in this congregation is a woman who came 8000 miles to claim that right, and who is there among mortals that can deny her that privilege. Who has the right to deny my daughter the privilege of marrying, if the opportunity presents, though it means honorable plural marriage?

"I recall a prophecy accredited to the late President Joseph F. Smith to the effect that when outsiders and the people in the Church fight the principle of plural marriage, then the more need to obey it. 'I further predict,' he said, 'that the United States will yet practice that principle; not because we do, but because of necessity.'

"These are very serious facts, my brothers and sisters—facts that we have got to meet and acknowledge. Talk about immorality, plenty of it exists among our people in this city. President Heber C. Kimball once predicted that if we gave this principle of plural marriage up (which we have done) our daughters would walk the street as common harlots and the parents could not help themselves. This is being fulfilled at the present time. The town and state is filled with soldiers, many of them loose, corrupt and diseased, and they are associating with the fair daughters of Zion and corrupting them, while we try to stay the yearning hearts of these fair daughters that are reaching out for motherhood we say they must not marry because there are too many of them; they may entertain the stranger but must

not entertain plural marriage even though all the parties involved are agreeable to the arrangement."

Mr. Roberts: I think there should be some limitation. I have sat here quite a while listening to this, but it seems to me he should at least give the witness an opportunity to be heard as to whether or not this was said. Then the thing of reading this entire talk in this manner—if there is something of importance which he wants out of it, let him read that, and ask if that was not said, instead of this entire thing. And I object to it on the grounds of its length and on the ground that only those parts that are material should be pointed out here. I don't think this witness could [fol. 42] say that was correct. She could say that was, in a general way. I suggest at this time counsel permit the witness to answer the question after each statement or two has been said.

Mr. Barnes: I have asked her, under oath, to indicate the second that I was stating something that didn't occur.

A. He could say some little word in there and I wouldn't know. It has been so long.

By Mr. Barnes:

Q. I am asking you if there is anything that strikes you as not having been said at that time?

A. I think all this was said, yes.

Mr. Barnes: She says, "I think all this was said."

A. I remember hearing this, yes.

Mr. Barnes: I am nearly through with this, and the next paragraph is very important.

The Court: Go ahead.

Mr. Barnes: The reason I am reading it all is because I wanted to read the parts that might be construed unfavorable as well as that which I regarded as otherwise.

"I have had leading Gentiles tell me that if the government would leave the Mormons alone for fifty years and let them practice their system of marriage they would be the greatest people upon the face of the earth, mentally, physically and spiritually. Now, a principle that would bring that result is not a bad principle. This group is not all engaged in the practice of plural mar-

riage, and we are not urging them to enter the system, but those who want to go back into the presence of Father and qualify as Gods will have to live the law that Father is living—and one of those laws is plural marriage in the celestial order."

Q. I think you have answered you recall that being stated upon that occasion; is that correct?

A. Yes.

Mr. Barnes: That is all.

Mr. Roberts: That is all.

[fol. 43] In District Court of Salt Lake County

Verdict

We, the jurors impaneled in the above case, find the following named defendants:

All of the 31 defendants named above guilty as charged in the information.

Dated Oct. 6, 1944.

(Signed) David T. McNeil, Foreman.

[fol. 44] In District Court of Salt Lake County

Notice of Motion for New Trial and Form of Motion—

Filed October 10, 1944

To The State of Utah and to Brigham E. Roberts, District Attorney, Third Judicial District of the State of Utah;

Please take notice that the defendants other than the defendant LeBaron will move the above entitled court that it grant to said defendants each, severally and jointly a new trial in the above entitled action at the hour of 2 o'clock P. M. on Friday the 10th day of November, 1944, and that a copy of such motion to be made is as follows:

Motion for New Trial

Come now the defendants in the above entitled action other than the defendant LeBaron by their counsel herein

and jointly and each for themselves severally respectfully move the above entitled court as follows:

That a new trial be granted to them and to each of them severally in the above entitled action.

For ground for said motion the defendants, and each of them severally, rely upon the files and records herein, the minutes of the above entitled court, the laws of the State of Utah, the Constitution of the State of Utah, the Constitution of the United States and the Treaty of Guadalupe Hidalgo, and the following averments, to-wit:

1. The jury received out of court evidence other than that which might result from a view of the premises, or some communication, document or paper referring to the cause.

2. The jury was guilty of misconduct by which a fair and due consideration of the cause was prevented.

3. The verdict returned by the jury was determined by lot or other means than a fair expression of an opinion on the part of all of the jurors.

[fol. 45] 4. That the court has misdirected the jury in matters of law.

5. That the court erred in deciding questions of law arising during the course of the trial.

6. That the court allowed the District Attorney and the Assistant District Attorney in their arguments to the jury to dwell upon and argue matters of purported evidence which were not before the jury for its consideration, over the objections of defendants timely made, in prejudice to the substantial rights of the defendants and each of them.

7. That the court submitted the question of the guilt of each of the defendants when a number of them were not in any wise shown by the evidence to have done any act or thing relating to the crime charged, to the prejudice of the substantial rights of all, and each of the defendants.

8. That the verdict is contrary to law.

9. That the verdict is contrary to and not supported by the evidence.

10. That new evidence has been discovered material to the defendants and each of them, and which they could not by

the exercise of reasonable diligence have discovered and produced at the trial. This motion will be supported by evidence to be filed in the time required by law.

Respectfully submitted, Joseph H. McKnight, Knox Patterson, Claude T. Barnes, Attorneys for Defendants Other Than the Defendant LeBaron. By (Signed) Claude T. Barnes. Edwin D. Hatch of Counsel for Defendants Other Than the Defendant LeBaron.

[fol. 46] You will please govern yourselves accordingly.

Dated this 10th day of October, 1944.

Joseph H. McKnight, Knox Patterson, Claude T. Barnes, Attorneys for Defendants Other Than the Defendant LeBaron. (By (Signed) Claude T. Barnes. Edwin D. Hatch of Counsel for Defendants Other Than the Defendant LeBaron.

Received copy of the foregoing Notice and Form of Motion for New Trial this 10th day of October, 1944.

Brigham E. Roberts, District Attorney for the Third Judicial District for the State of Utah, by (Signed) Howard F. Coray, Deputy County Attorney.

[File endorsement omitted.]

[fol. 47] In District Court of Salt Lake County

Motion for Judgment of Not Guilty Non Obstante Veredicto—Filed October 30, 1944

Comes now Joseph White Musser, one of the defendants, and moves the Court for judgment of not guilty in favor of said defendant notwithstanding the verdict. Said motion is based on the fact that the evidence as shown by the transcript thereof is insufficient to prove the commission by this defendant of the crime charged.

(Signed) Claude T. Barnes, J. H. McKnight, Knox Patterson, Attorneys for said Defendant. (Signed) Ed. D. Hatch, of Counsel.

Received copy this 30 day of October, 1944.

(Signed) Brigham E. Roberts, District Attorney.

[fol. 48] IN DISTRICT COURT OF SALT LAKE COUNTY

JUDGMENT

November 10, 1944.

Defendants' motion for a new trial comes now on for hearing, defendant Ross Wesley LeBaron being present in person and being represented by Ray McCarty as counsel, and all other defendants being present in person and being represented by J. H. McKnight and Knox Patterson as counsel, and Brigham E. Roberts, District Attorney, and H. D. Lowry, Assistant District Attorney, appearing in behalf of the State of Utah.

Comes now Ray McCarty and submits the motion of defendant Ross Wesley LeBaron for a new trial without argument. Comes now Conrad Wittenberg and asks and is permitted to withdraw as bondsman for said defendant Ross Wesley LeBaron, and said bondsman is released from all further obligations in the within case. Whereupon the motion for a new trial by all remaining defendants is argued to the Court by respective counsel, and documentary proof (Exhibit "AA", letter of Mark Peterson) is offered by said defendants and received, and said motion is submitted, and the Court being fully advised in the premises, it is ordered that said motion is denied as to all defendants.

It is further ordered that defendants' motions for judgment of not guilty, Non Obstante Veredicto, are also denied. Whereupon this being the time heretofore fixed for the passing of sentence upon the above named defendants, and the defendants having answered that they, and each of them, have no legal cause why sentence should not be pronounced at this time, the Court now pronounces the following judgment and sentence:

"It is the judgment and sentence of this Court that you, Joseph White Musser, John Yates Barlow, Louis Alba Kelsch, Heber Kimball Cleveland, Charles Frederick Zitting, Dr. Ruland Clark Allred, Albert Edmund Barlow, Ruland Timpson Jeffs, George Hemicke Kalmar, Ross Wesley LeBaron, Guy H. Musser, Robert Leslie Shrewsbury Alma Adelbert Timpson, Zola Chatwin Cleveland, Marie Beth Barlow Cleveland, Rhea Allred Kunz, Myrtle Lloyd, Ruth Barlow, Melba Finlayson, Mable Finlayson, Mary Mills, Leona Jeffs,

Juanite Barlow, Jean Barlow Darger, John (Hans) [fols. 49-50] Gerhardt Butchereit, Jonathan Marion Hammon, Ianthius Winford Barlow, Joseph Lyman Jessup, David Brigham Darger, Morris Quincy Kunz, and Edmund F. Barlow, and each of you, be confined and imprisoned in the Salt Lake County Jail for a term of one (1) year."

It is further ordered that stay of execution of sentence for all defendants other than Ross Wesley LeBaron be granted to and including November 17, 1944, pending the filing of appeal bonds, said bonds to be of the same amounts as the bonds now in force. It is further ordered that a commitment issue forthwith for defendant Ross Wesley LeBaron for the reason that bondsman for said defendant LeBaron has withdrawn.

[fol. 51] IN SUPREME COURT OF UTAH

APPELLANTS' ASSIGNMENTS OF ERROR

1

The Court erred in its refusal to give Defendants' Requested Instructions Nos. 1, 2, 6, 7, 8, 9, 10, 11, 12, 13, 16, 17, 18, 22, 23, 25, 26, 28, 29, 30, 31, 33, 34, 38, 40.

9

In not giving the substance of defendants' requested Instruction No. XXIV, as to the effect of a discussion being one of religion and religious principle, and so disregarding the fundamental rights of defendants under the First Amendment to the Constitution of the United States of America.

11

In its failure to give to the jury, either verbatim or in substance, defendants' requested Instruction No. 36; thereby denying to defendants, and each of them, their fundamental rights under the 1st, 6th, 8th and 14th Amendments to the United States Constitution.

14

In its refusal to give to the jury any part of the substance contained in defendants' requested Instruction No. 42, so

denying to defendants their fundamental rights under the 1st and 14th Amendments of the Constitution of the United States of America.

15

The Trial Court erred in excluding from all consideration by the jury, and in failing to instruct thereon, the religious belief and doctrine of the defendants, so denying to them their fundamental constitutional rights under the 1st and 14th Amendments to the Constitution of the United States, as to religious matters, and further so denying to defendants, and each of them, due process of law.

[fol. 52]

18

The Court erred in giving Instruction No. 1, in this:

It is so incomplete as to amount to a mis-statement of the law, until the Court further instructed that such acts, if proved, were not in or of themselves any transgression of law, or any evidence of any conspiracy, unless shown to have been done in furtherance of the carrying out of a conspiracy inimical to public morals. Such is particularly true in the light of the contents of the Court's Instruction No. 4, said last being not contained in Instruction No. 1, or inferable therefrom. So, defendants have been deprived of the due process of law as guaranteed by the Federal Constitution.

20

The Court erred in its Instruction numbered 4, generally and particularly, and particularly in the last paragraph thereof, in that the Court therein declared that the practice of a religious tenet, when proscribed by the civil law is, in fact, an immorality, and injurious to public morals—a determination beyond the power of any Court to make. The law cannot declare upon such matters, the proscription of the Federal Constitution precluding either the Legislative or the Judicial or the Executive branch of the government of any State, or the Nation, from the exercise of such power; hence any instruction, that such acts were "a matter of law", amounts to an instruction upon the same "as a matter of fact", and is beyond the powers of any Court. The defendants were thereby denied due process of law.

21

The Court erred in Instruction No. 5 in this: It included in the overt acts the charged "attempt" to convert Helen Smith. It nowhere appears that such attempt so much as slightly influenced Helen Smith in the premises; that she at no time contemplated any compliance with the religious tenet, but, on the contrary, denied and fought it openly. Under the law of "attempt", no such is here shown, and such inclusion of the same was error in law. The defendants were thereby denied due process of law. Such seems to have been recognized by the trial Court as is evidenced [fol. 53] by the final paragraph of said instruction.

This error, in combination with the same inclusion in Instruction No. 1, placed undue emphasis upon a matter erroneously instructed upon, and erroneously included as aforesaid, so misleading the jury, to the prejudice of every defendant, and to the denial of due process of law to each.

25

The Court erred in giving Instruction No. 9 in this: It failed to instruct that any specific law of Utah had application to the charge here; failed to instruct that no violation of any law of Utah is shown by any acts which might be included in, and not exceeding those matters stated in its first paragraph; that something further than that must appear.

Said instruction is so general as to leave to the jury the determination of what, if any, law of Utah the defendants might have been held to have violated. Thereby each defendant has been denied due process of law.

30

The Court erred in its statement to the jury, at the very outset of the proceedings as follows:

"I want to say to you at this time, that the mere fact that you have read about this case in the newspapers, or that you have discussed it with others, or heard it discussed by others, or *that you have formed or expressed an opinion* based solely upon newspaper accounts of the case, or gossip or common notoriety, those things in and by themselves *do not disqualify you from serving as jurors on this case, if you can, in spite of that,* and nevertheless *be*

fair and impartial, put to one side any opinion that you may have formed, based upon the sources that I have indicated." (Italics inserted.) This ignored a deep seated bias created by a religious conflict.

No juror, having such position, could possibly be a disinterested or impartial juror, hence was disqualified for favor if not for actual bias. (See: Reynolds v. U. S., 96 U. S. 246; U. S. v. Miles, 103 U. S. 304, and numerous other cases so holding.) *No juror, having such necessity to for-* [fol. 54] *get, could begin with a presumption of innocence.* Thereby the Court denied to defendants due process of law and a fair trial by impartial jurors, in violation of their Constitutional rights, under Constitutions of Utah and of the United States, and the 1st and 14th Amendments to said United States Constitution.

34

The Court erred in its statement of his test of opinion that might be held and that would disqualify a juror as follows:

". . ., I want to know now if that opinion is a conviction of such fixity in your mind *that it would not yield* to the evidence produced in this courtroom?" and thereby conveyed to all other prospective jurors that such an *opinion as "would not yield" to evidence of innocence* was the sort of opinion which, alone, would disqualify a juror, so implanting erroneous concepts in the minds of other jurors, and so, in effect, stating that a burden rested upon each defendant to prove his innocence, and so remove such opinion.

Thereby all jurors under examination were erroneously instructed and such necessarily entered into the form and type of response to all after-questions upon the subject of possible opinion held by them, and so affected their concept of the requirements of law as to preclude their proper answer to such questions. Thereby the Court denied to defendants due process of law, and their Constitutional rights thereto.

36

The Court erred in its contradiction of the law of challenge of juror for cause in criminal cases as stated by J. H. McKnight, Esq., and so denied to defendants due process of law.

37

The Court, in its examination of jurors for opinion held, failed to accord to the defendants their Constitutional rights to have jurors sit for trial of the case whose prior opinions were not such as would require evidence to change the same, and so denied to defendants their Constitutional [fol. 55] rights to fair and impartial trial before fair and impartial jurors, and so due process of law.

38

The Court erred in its question addressed to the juror, Mr. Decker, as follows:—"Is it such an opinion that it would not yield to the facts presented here in the court room before you for your consideration, as a juror?" in that the same is a mis-statement of the law and implied a necessity for a showing of innocence on the part of the defendants at the outset of any trial, and a continuance of such proof by the defendants, so by clear import, fixing in the minds of other jurors such as the test of opinion as a disqualifying element, and denying to defendants due process of law.

74

Court's statement of the "condition" of connecting the husband of Helen G. Smith as co-conspirator, after elimination of him as such at the beginning, as the assigned basis *relied on by the Court for the admission of his wife's testimony* in the case, and then the continuance of her examination. And the subsequent admission of any of her testimony.

Thereby the said Heber G. Smith, to all intents and for all purposes, was made to be considered by the jury as a defendant on trial, as a co-conspirator, and so allowing his personal persuasions of his wife to be carried over as against all defendants then actually and lawfully on trial.

Thereby the Constitutional provision that such could not occur *except on the express consent of Smith* (and no such even being seemingly present) was violently disregarded, to the irreparable injury of each defendant, and the testimony of this witness was most convincing to the jury, without any possible doubt. Thereby due process of law was not accorded.

177

Ruling, denying new trial.

[fol. 56] 178

Ruling denying "motion *non obstante veredicto*". Denied due process, violated 1st and 14th Amendments.

179

Sentence passed, ignoring objection, as to time. Denied due process, and in clear violation of the statute.

180

Denial of Demand for Bill of Particulars.

181

Denial of Motion to Quash. (Sept. 5, 1944.)

182

Denial of Motion to Dismiss as to all the Defendants. (October 2, 1944.)

183

Denial of Motion to Dismiss as to fourteen defendants. (October 2, 1944.)

184

Denial of Motion to Dismiss as to individual defendants.

185

Denial of Motion for Declaration of Mistrial (Oct. 2, 1944.)

186

Denial of Motion of Mistrial. (October 6, 1944.)

[fol. 57] IN THE SUPREME COURT OF THE STATE OF UTAH

No. 6816

THE STATE OF UTAH, Plaintiff and Respondent,

v.

JOSEPH WHITE MUSSER, JOHN YATES BARLOW, LOUIS ALBA KELSCH, Heber Kimball Cleveland, Charles Frederick Zitting, Dr. Ruland Clark Allred, Albert Edmund Barlow, Duane Marvell Gee, Ruland Timpson Jeffs, George Hemicke Kalmar, Ross Wesley LeBaron, Guy H. Musser, Robert Leslie Shrewsbury, Heber Chase Smith, Jr., Alma Adelbert Timpson, Zola Chatwin Cleveland, Marie Beth Barlow Cleveland, Rhea Allred Kunz, Myrtle Lloyd, Ruth Barlow, Melba Finlayson, Mable Finlayson, Mary Milis, Leona Jeffs, Juanita Barlow, Jean Barlow Darger, John (Hans) Gerhardt Butchereit, Jonathan Marion Hammon, Ianthius Winford Barlow, Joseph Lyman Jessup, David Brigham Darger, Morris Quincy Kunz, Edmund F. Barlow, Oswald Brainich, Defendants and Appellants

OPINION

McDONOUGH, *Justice:*

By information 33 persons were accused of criminal conspiracy to commit acts injurious to public morals in violation of Sec. 103-11-1 (5), U. C. A. 1943. The information in substance charges that between June 1, 1935, and March 1, 1944, in Salt Lake County, State of Utah, the defendants wilfully and unlawfully agreed, combined, conspired and confederated among themselves and with other persons unknown to the district attorney,

> "to advocate, promote, encourage, urge, teach, counsel, advise *and* practice polygamous or plural marriages and to advocate, promote, encourage, urge, counsel, advise *and* practice the cohabiting of one male person with more than one woman and in furtherance and pursuance of said conspiracy and to effect the object thereof, did commit the following acts:"

(1) That from June 1, 1935, to March 1, 1944, in Salt Lake County, State of Utah, defendants published and distributed once each month, a pamphlet called "Truth"; (2) that on

July 1, 1942, defendants purchased a house at 2157 Lincoln Street in Salt Lake City; and (3) that in 1942 and 1943 in Salt Lake County the defendants attempted to convert Helen Smith to believe in and to live in polygamy. Other overt acts alleged, were not submitted to the jury for consideration.

[fol. 58] Defendants moved to quash the information on two grounds only: (a) That it does not charge the commission of any public offense; and (b) that it states matters amounting to legal justification. Independent of any interpretation by counsel, the information suggests that defendants as a group agreed to practice polygamy, a felony. Since an agreement between one man and a plural number of women to practice polygamy, followed by the overt act of polygamous marriage of the persons so agreeing, would constitute the substantive offense of polygamy by the man, a serious question might arise as to whether such an agreement would charge conspiracy. Defendants did not move to quash on the ground that the information is ambiguous, uncertain, or that it charged more than one offense.

If "the" appeared in lieu of "and" in the two places italicized, and "of" appeared after the word "practice" in each instance, the information would read the way the State apparently construes it. From the argument of defendants in assailing the information for failure to state a public offense, it would appear that in spite of the awkward and ambiguous sentence structure appellants have apparently adopted the construction urged by the State, that the information attempts to charge a conspiracy to commit acts injurious to public morals, by an agreement entered into between defendants to advocate, teach, counsel, advise, encourage and urge other persons to engage in the practice of polygamy and the cohabitation of a man with more than one woman.

Since the alleged conspiracy relates to acts injurious to public morals, the primary question to be determined in testing the sufficiency of the information is, Does the advocacy of the practice of polygamy and the urging of other people to engage in such practices within the State of Utah, constitute *acts* injurious to public morals within the meaning of the conspiracy statute? At the oral argument counsel for appellants contended that *advocating* the practice of polygamy is merely the expression of an opinion or belief; that

such teachings do not constitute *acts;* that such advocacy consequently could not constitute acts injurious to public morals; and that such expressions of opinion and belief are immune from prosecution under the constitutional guarantees of religious liberty and freedom of speech, and could not properly be the subject of criminal conspiracy. They further contend that in a recent case in the United States district court involving a number of the defendants in this case, (United States v. Barlow, et al., 56 F. Supp. 795), it was held that advocating the practice of polygamy as a religious belief, does not tend to deprave public morals. They also claim that by reason of the fact that the appeal by the [fol. 59] government was dismissed by order of the United States Supreme Court, (323 U. S. 805, 65 S. Ct. 25), such decision on such a question became final and conclusive, and is binding on the courts of this state.

In that case some of the defendants here were indicted for conspiracy to violate 18 U. S. C. A. Sec. 334 as amended, which forbids mailing of "obscene, lewd, or lascivious" books, pamphlets, pictures, "or other publication of an indecent character." The defendants were alleged to have published and circulated "Truth" magazine, the publication and distribution of which are charged as overt acts in this case. U. S. v. Barlow, supra, was dismissed, because in the opinion of the Federal judge the excerpts from said magazine charged in the indictment as nonmailable matters under the Federal statute, were not calculated to "corrupt and debauch the minds and morals" of those into whose hands such publications might come. The opinion relates to the interpretation of the Federal statute, and states that the indictment does not charge an offense against the United States. The opinion does state that editorials in such magazines advocate the practice of polygamy, but while stating that such publication is not subject to prosecution under federal statutes, the language recognizes that the act in question might well be subject to prosecution under the laws of Utah:

> "The constitution of Utah prohibits polygamous or plural marriages. It might well be said that any prosecution for violations thereof under our theory of government is a purely local matter for the State rather than the Federal Government, in the absence of a widespread violation of the law."

Absent any constitutional limitation on the power of a state to legislate an adjudication by a Federal court that a specified act does not contravene a Federal statute does not even warrant an inference that such conduct would not violate a state statute. Appellants' contention to the contrary is without merit.

Article III of our State constitution prohibits plural or polygamous marriages. Statutes enacted pursuant thereto, Secs. 103-51-1 and 2, U. C. A. 1943, makes felonious both the practice of polygamy and cohabitation of a man with more than one woman. Such relations are regarded by the law as meretricious. Conduct which induces people to enter into such felonious meretricious relationships, is certainly conduct injurious to public morals. Defendants, however, contend that if a conspiracy could be charged for expression of beliefs and ideas, then every effort to change some obnoxious law or some objectional constitutional provision could be thwarted by a conspiracy charge. There is a vast distinction between advocating a change in the law [fol. 60] by appropriate legislation, and urging people to commit acts in violation of the law. Advocating violation of law is not an equivalent of urging repeal of the law.

Admittedly, a person cannot properly be prosecuted for expressing opinions nor for mere beliefs and personal convictions, however peculiar or repugnant they might seem to others. However, conduct condemned by statute may not "be made a religious rite and by the zeal of the practicioners swept into the First (or Fourteenth) Amendment." Murdock v. Pennsylvania, 319 U. S. 105, 63 S. Ct. 870, 87 L. Ed. 1292. State v. Barlow, et al., 107 Utah 292, 153 P. 2d 647.

Statutes do not attempt to regulate beliefs, but conduct. Freedom of speech and of religion are not unlimited licenses to do unlawful acts under the labels of constitutional privilege. Expressions and the use of words may constitute verbal acts. Words may ignite an inferno of mob violence. As stated by Mr. Justice Holmes in Schenck v. United States, 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 470: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force." See also Gitlow v. New York, 268 U. S. 652, 45 S. Ct. 625,

69 L. Ed. 1138, wherein the court said: "That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question." In Davis v. Beason, 133 U. S. 333, 33 L. Ed. 673, 10 S. Ct. 299, wherein petitioners had been convicted of a conspiracy to obstruct the due administration of the laws of Idaho, the Supreme Court in upholding the judgment said: "Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. * * * If they are crimes, then to teach, advise and counsel their practice is to aid in their commission, and such teaching and counseling are themselves criminal and proper subjects of punishment, as aiding and abetting crime are in all other cases."

We therefore hold that an agreement to advocate, teach, counsel, advise and urge other persons to practice polygamy and unlawful cohabitation, is an agreement to commit *acts* injurious to public morals within the scope of the conspiracy statute.

[fol. 61] Other than agreements to commit certain felonies which require no overt acts, an unlawful agreement as defined in Sec. 103-11-1, U. C. A. 1943, does not amount to a conspiracy according to the specifications of Sec. 103-11-3, "unless some act, besides such agreement, is done to effect the object thereof by one or more of the parties to the agreement." Thus, a criminal conspiracy essentially consists of an unlawful agreement plus some overt act or acts done to further or to accomplish the object of such an agreement. Defense counsel claim that the information does not show that any alleged overt act was either unlawful or effective. An act done in furtherance of an agreement need not succeed in accomplishing its objective in order to fulfill the requirements of the statute. Thus, the failure to allege that the attempts to convert Helen Smith to believe in and to live in polygamy were successful, would not render the information deficient.

Appellants urge that the right to purchase property is a constitutional privilege, whether for purpose of having a place of worship, a home, for social gatherings or other uses in the pursuit of happiness, and that such purchase

could not be an overt act. The argument seems to miss the point. An act need not be unlawful to be an overt act. It must necessarily be an act which is done in furtherance of the object of the unlawful agreement. State v. Erwin, et al., 10 1 Utah 365, 120 P. 2d 285. The purchase of a gun ordinarily is a lawful act; yet, if there is an agreement to commit murder (which is a criminal conspiracy without any overt act), the purchase of a gun by one of the conspirators for the purpose of carrying out the homicidal agreement would be an overt act. The procurement of any tool, device or instrumentality by one who has entered into the unlawful agreement, which constitutes a step toward the accomplishment of the object of the agreement, is an overt act. There must, of course, be proof that the overt act as alleged was done in furtherance of the unlawful agreement. The information however, need not allege the circumstances which show connection with the unlawful scheme and that such an act was done in furtherance of the unlawful agreement. Such details may be supplied by a bill of particulars.

The three alleged overt acts stated in the information which the court permitted to remain when the case was submitted to the jury, are sufficient statements of overt acts to uphold the information. Whether there was sufficient proof to show that such acts were actually done by the persons alleged and done in furtherance of the alleged unlawful scheme is another question presently to be considered.

[fol. 62] While defendants assign as error the refusal of the court to order the district attorney to furnish a bill of particulars, such assignment of error is not argued, and hence must be deemed to have been abandoned. There are numerous other assignments of error relating to admission and exclusion of evidence wherein appellants compiain that the court erred, without specifying wherein error occurred and without arguing such alleged errors. Of the 186 alleged errors specified, we shall consider those only which are properly specified and which are argued. Those not argued are deemed to have been waived.

Appellants challenge the verdict on the ground that the evidence was insufficient to support a conviction of the defendants as a whole or any of the defendants. They claim error in failure of the court to give their request for directed verdict as to each defendant. It is contended that the State failed to prove that the defendants entered into the agreement alleged. They also argue that there was not sufficient

competent proof to show that each defendant was a party to an unlawful agreement, and that no overt act was satisfactorily proved.

The State had the burden of proving that there was actually a conspiracy, that there was a meeting of the minds between the defendants on the unlawful scheme alleged, and that one or more of such defendants so agreeing committed some overt act or acts in furtherance of the object of such unlawful agreement. The rule of presumption of innocence applies to each individual defendant. The fact that a defendant may be charged as a co-conspirator does not deprive him of any of those safeguards called due process of law, which necessitate that evidence produced against him shall be competent, relevant and material.

An alleged unlawful agreement may be proved by circumstantial evidence insofar as the evidence is competent; but until a defendant is proved by competent evidence to have entered into or to have joined in the alleged unlawful agreement, extrajudicial statements and admissions of co-defendants which tend to implicate him as a party to the agreement or in some overt act, are hearsay and inadmissible as to him. However, when a defendant is shown by competent proof to be a party, then all other persons proved to be parties are his agents for purposes of the unlawful agreement so that acts of such other parties relating to the unlawful agreement or overt acts in furtherance of the agreement are binding upon him under the rules of agency. State v. Erwin, supra. Until a defendant is proved to be a principal, other defendants shown to be parties would not [fol. 63] be his agents, and statements made out of his presence would not be binding upon him regardless of how they might tend to implicate him.

Likewise, where proof of an unlawful agreement is furnished by an accomplice, there must be sufficient corroborative evidence to identify each defendant as a party to the unlawful scheme. If, as to any particular defendant, there is lacking corroborative evidence of that given by an accomplice, the verdict against him cannot stand. Since the transcript shows that evidence introduced to prove that certain defendants were parties to the unlawful agreement or that they later joined in such agreement, was but hearsay, the verdict as to those particular defendants cannot be upheld. As to some defendants identified as parties to the scheme by the testimony of an accomplice, there was no corrobora-

tion by competent evidence, and the verdict as to those defendants likewise must be set aside.

There is some evidence which, standing alone, is just as consistent with innocent conduct as with any theory of unlawful conduct, as such cannot satisfy the requirements of proof. For example, testimony that a certain defendant was seen engaging in conversation with a defendant shown to be a party to the unlawful agreement, without disclosure as to what was said, neither proves that such defendant entered into an agreement nor that if an agreement of some kind was made that it was the unlawful agreement alleged. There were also numerous statements of State's witnesses that a certain defendant "discussed polygamy" without detailing what was said about it. Such generalities have no probative force. The testimony that a defendant "discussed the subject of plural marriage" is not the basis for the slightest inference that anything charged by the State ever occurred. If the witness had testified that a defendant "discussed the subject of crime", no inference could be drawn that he urged someone to commit a crime, nor that he solicited someone to enter into an agreement to commit crime.

There was considerable testimony that some defendants attended meetings at which the subject of polygamy was discussed; that at such meetings some speakers made statements that they had a right to practice polygamy; that the law could not stop them; and that it was the duty of the women to go out and get other wives for their husbands. Mere attendance at meetings is not evidence that the members of the audience entered into any agreement, nor could it imply that the listeners were responsible for what was said at such meetings. The complement of freedom of speech is the right to listen to a speaker's views. Even if a speaker urges violation of the law, no inference can be drawn from [fol. 64] such fact alone that members of the audience entered into an agreement to confederate with such speaker to carry out the design or scheme of such speaker. While coupled with other facts and circumstances, attendance at a meeting where persons proved to be conspirators address a meeting, might forge a chain of circumstantial evidence of an agreement with such conspirators; yet, standing alone, such passive attendance at such meetings would not have sufficient probative value to warrant an inference of unlawful conduct.

Appellants argue that the evidence as a whole merely shows that defendants met for religious purposes; that they conducted ownership, expressed *beliefs* concerning the hereafter; that any person in the congregation was permitted to express his views; and that such meetings and discussions held openly and without barring the general public, were all in the exercise of the constitutional rights of freedom of worship and freedom of speech. Since a conspiracy must necessarily involve some agreement to do something which the parties do not have a right to do, they contend that defendants did only what they had a constitutional right to do, and that consequently no conspiracy could be spelled out from such events.

It is true that *some* evidence introduced by the State would merely show that certain defendants attended such meetings; that some meetings were conducted as religious services; that speakers and class-leaders read from the Bible and other religious works; that tithing was collected, and in part used for relief of persons in economic distress; that at some services topics were discussed such as brotherly love, faith in God, repentance, baptism, patriotism, honesty and rewards after death; that at certain meetings speakers discussed polygamy, reading from the Bible and making the claim that the ancient polygamous marriage system was instituted of God, and that "plural marriage is a law of God," and that some individuals at these meetings declared that legislation prohibiting the practice of polygamy violates the spirit of the First Amendment to the Federal Constitution; that some speakers denounced officials of the Mormon Church for excommunication of people for teaching or practicing plural marriage, stating that the leaders of said church have "no divine authority" and that such church is apostate; and that some services were conducted as "testimonial meetings" at which members of the congregation arose voluntarily to express their views on any subject, and to acknowledge gratitude to God. Counsel for appellants say that this prosecution is nothing more than persecution of appellants for expression of unorthodox views and for membership in an unpopular minority group.

[fol. 65] If it were true that none of the defendants did anything other than to attend meetings as indicated above, expressing disagreement with some other denomination, criticizing legislation, and giving opinions on religious

subjects, none of the convictions could be upheld. The right of free speech cannot be curtailed by indirection through a charge of criminal conspiracy. However, an examination of the entire record discloses that the foregoing statement of evidence does not present the entire picture as to some of the defendants.

We have reviewed the record carefully and conclude that the evidence is sufficient to show an agreement to advocate, counsel, advise and urge the practice of polygamy and unlawful cohabitation by other persons; and that the following named defendants were parties to such unlawful agreement: Joseph White Musser, Guy W. Musser, Charles Frederick Zitting, Heber Kimball Cleveland, Zola Chatwin Cleveland, Jonathan M. Hammon, Ross Wesley LeBaron, John Y. Barlow, Albert Edmund Barlow, Edmund Francis Barlow, Ianthius Barlow, Juanita Barlow, Louis A. Kelsch, Dr. Rulon Clark Allred, David B. Darger, Jean Barlow Darger, Rulon T. Jeffs, George H. Kalmar, Joseph Lyman Jessup, and Alma A. Timpson.

As to the other defendants, there is not, in our opinion, sufficient competent proof, to show that they were parties to the agreement. In some instances, as to defendants against whom the proof is insufficient, there were admissions that they themselves had entered into polygamous relationships; but standing alone, such admissions do not constitute proof that they had entered into an agreement to induce third parties to enter into such practice. Some of the women defendants stated in testimonial meetings that they were "happy with their sister wives" and that they helped each other with the housework. Such statements, standing alone, would not be proof of any unlawful agreement to urge others to practice polygamy. Some statements of some defendants would tend to show that said defendants were victims, rather than principals.

An admission by a person that he had engaged in the commission of some crime or had aided or abetted it in some way, would not be the equivalent of an admission that he had entered into an agreement with someone else to attempt to get others to commit the same kind of crime. Certain evidence tends to show that some defendants associated and communicated with each other because they had violated the law by previously entering into unlawful practices and that they had sought refuge from prosecution.

[fol. 66] There is sufficient competent evidence that the defendants hereinabove specifically named made such statements and did such other acts as to show a meeting of the minds on the unlawful scheme alleged. They used the mechanism of an organization ostensibly and perhaps sincerely designed for religious purposes to commit overt acts in furtherance of their unlawful agreement. Contrary to the arguments of counsel, these particular defendants did not merely express beliefs and limit their remarks to mere academic discussions. It is true that they discussed theological topics at some of their meetings; but they also spoke about polygamy in such a way as to evidence a design to induce others to act and pressure was applied to several people.

Without attempting to detail all of the evidence which shows an agreement such as alleged, we direct attention to certain evidence. Some of the men claimed in public that they had the right to perform polygamous marriages. They proclaimed that polygamy *must* be lived, one defendant saying that the law makes no difference with them. One defendant declared that polygamy should be practiced at present; that public relief "was instituted of the Lord for the polygamy people", and that they should get on relief and stay on relief. One defendant announced that it was the duty of women to find other wives for their husbands. Some also announced in meetings attended by persons not indulging in such practices, that no woman should prevent her husband from taking another wife, and that she should go along with her husband or else step aside so he could take another wife, and that men should have the courage to act. At one of these meetings, one Heber C. Smith, Jr. was made the specific object of remarks of various defendants.

We cite this evidence of acts which tend to prove the agreement itself which shows a systematized plan to induce others to enter into the practice of polygamy, in which scheme of advocacy a number of these defendants participated. Although, as heretofore stated, it is not essential to the existence of a conspiracy that the object of such conspiracy be actuually accomplished, it would appear from the evidence that the efforts to induce Heber C. Smith, Jr. to practice polygamy were actually successful, and that he and his family were among the victims of this conspiracy. There is some evidence that LeBaron with

the aid of his wife, and the arrangements made by Zitting, induced a 13 year old girl to agree to be his polygamous wife. Zitting told her all she would have to do is bear children. While no marriage ceremony was proved, such proof was not necessary. LeBaron stated to the father of this witness that the girl was his wife.

[fol. 67] That this agreement contemplated actual inducements and solicitations directed at others is evident from the testimony of a defense witness. She testified that defendant Hammon stated in one of the meetings that if a man is interested in a girl who is under age and he wants the girl, he should go to the father and first obtain his consent. The witness stated that she understood this to relate to polygamy.

What we have said hereinabove disposes of the argument that none of the defendants did anything except engage harmlessly in the expression of religious beliefs. In fact, some of these defendants wilfully broke up the home of Helen Smith by persistently urging and inducing her husband to enter into the practice of polygamy. The solicitations which induced Heber C. Smith, Jr. to enter polygamy, all in opposition to the interests and desires of his wife, Helen Smith, and the consequent broken home from the divorce which followed, are a complete answer to the contention that none of the defendants said or did anything which could be construed to be injurious to public morals. The claim that everything was on a voluntary basis and that the wishes of others were respected, is unconvincing in view of the unrefuted evidence to the contrary. The contention that all the defendants confined their activities to expressions of beliefs without interfering with the rights of others, and without attempting to induce others to act, is not sustained by the record.

Appellants argue that the alleged overt acts were not proved. It is urged that the publication of "Truth" magazine could not be an overt act in view of the constitutional guarantee of freedom of the press, since only a few editorials could be construed as advocating the practice of polygamy. It is true that the state relied on a few excerpts from said magazine which was published over a period of nine years. A question might arise ordinarily as to whether the publication of a periodical involving numerous issues and extending over a period of years could be considered as one all-embracing overt act. This publi-

cation started in 1935. In order to have been an overt act, the unlawful agreement must have previously come into being, for an overt act is something done in furtherance of the object of the unlawful agreement. The unlawful agreement in this case appears to have been entered into after "Truth" magazine had been published for several years. As to those issues, they could not constitute any overt act. Some of the articles appearing in those magazines were reprints of articles advocating the practice of polygamy, published many years before statehood and prior to enactment of legislation by this state prohibiting such practices. In view of other matters, we are not called upon to decide whether reproduction of those articles amounts to a present advocacy of such a practice.

[fol. 68] Since the State introduced evidence which would tend to show that the house purchased by two of the defendants was used for religious services and for social gatherings, which were admittedly lawful objects, it is urged that such purchase could not be construed as an overt act. People have the right to purchase property for all lawful purposes. The fact that some defendants entered into an unlawful agreement would not necessarily constitute proof that the purchase was made in furtherance of the unlawful scheme. A purchase may be made for more than one purpose, for both a lawful and for an unlawful purpose. There is some evidence that the building was intended to be used in part at least by some of the defendants to advocate the practice of polygamy and unlawful cohabitation. There is also evidence that the house was used as a place of solicitation and to importune people to enter into polygamous relationships. An act done in furtherance of an unlawful agreement is an overt act even if there are additional objectives which happen to be lawful. However, where property is acquired for some purpose which is lawful, evidence that it was also acquired in furtherance of an unlawful scheme must be clear and unequivocal. There is evidence of such a character here.

It is contended that the solicitation of Helen Smith to agree to allow her husband to marry some other girl and to induce her to aid in establishing a polygamous relationship did not constitute an overt act because it was obvious that no amount of persuasion could possibly be effective. Such argument disregards the nature of an overt act. The object of the unlawful scheme was advocating and urg-

ing others to enter into prohibited relationships. Whether such inducements could succeed would not be material. The systematic solicitation, and urging of others to violate the law, went far beyond mere expressions of opinion contemplated by the guarantee of freedom of speech. Words were employed in conversation with Helen Smith with a design to induce her to consent to the proposed meretricious relationship. Pressure was applied to her husband and to her in the endeavor to overcome her antagonism. It is true, of course, that she would not have committed the crime of polygamy by giving her consent; but if she had yielded to the solicitations of certain defendants she would have been required to share her husband with some other woman or women; and because she refused to submit, her home was broken up by reason of the fact that her husband was induced to take a polygamous wife in spite of her objections and refusals.

[fol. 69] Defendants challenged the right of Helen Smith to testify. They claim she was disqualified as a witness because her former husband was named a defendant, although the State severed as to him. Her divorce from Heber C. Smith, Jr. had become final prior to the date of trial so that she was no longer the wife of said Smith. She could not therefore have been testifying against her husband as contended by appellants. See 70 C. J., "Witnesses", p. 125, Sec. 152 and cases cited; and 4 Wigmore on Evidence (2nd Ed) Sec. 2237 at p. 775.

The remaining question relating to her testimony is whether the court committed prejudicial error by overruling objections to questions as to what Heber C. Smith, Jr. said to her at the time he was still her husband. It is claimed in view of the language of Sec. 104-49-3 (1), U. C. A. 1943, any conversation between them during their marital status was privileged and that she could not divulge it. The statute, exclusive of the exception clause, forbids either husband or wife "during the marriage or afterwards" to be examined as to any communication made by one to the other during the marriage without the consent of the other. In In Re Ford's Estate, 70 Utah 456, 261 P. 15, it is stated that the "communication" between husband and wife contemplated by said statute consists of those communications and knowledge imparted which are confidential in character.

In substance, Helen Smith testified that Smith told her at the time she was still his wife, while they were on their way to one of the meetings with some of the defendants, that he thought that Barlow could convince her that she was wrong in opposing plural marriage. Just prior to their going to the Musser home he told her that he would like to have her hear Musser's views on plural marriage and that she would likely feel differently about it. Such remarks related to subjects which were to be and were discussed with third parties. Consequently, they could not be deemed confidential.

Furthermore, the question presented by the assignment of error was not presented to the court below. The only objection interposed below to the testimony of Helen Smith relative to these conversations with Heber C. Smith, Jr. was that it was incompetent, irrelevant, immaterial and hearsay. No objection based on communications between husband and wife was made. An objection to testimony on the ground of privilege is not properly made when based on the ground that it is incompetent. Proffit v. United States, 264 F. 299. Underhill's Criminal Evidence, (4th Ed.) p. 682.

[fol. 70] In connection with the argument that the court committed prejudicial error in excluding defense testimony, we note that counsel for appellants repeatedly asked the following question: "Did anyone at these meetings *urge* people to enter plural marriage?" Objections were repeatedly sustained, although some of the witnesses for the State said in their testimony that certain defendants at these meetings *urged* the practice of polygamy. No harm could have resulted from permitting an answer to the question as worded, although technically the question did call for a conclusion.

Prejudicial error is claimed by reason of certain comments of the trial judge on matters relating to evidence and to defendants. The matter most seriously argued related to contents of a pamphlet exhibited to a witness for the State who was an accomplice. On direct examination she had testified that some of the defendants had discussed polygamy with her and that defendant Cleveland had talked to her and read to her from a certain pamphlet on marriage of which defendant Joseph W. Musser was one of the authors. On cross-examination certain parts of the booklet were read to her and she admitted that they

were some of the portions Cleveland had read to her and she indicated that certain other parts sounded familiar. Later, counsel for defendants attempted to introduce the pamphlet in evidence, and since there had been read into the record the portions alleged to have been read to her, the offer was properly refused. However, in ruling on the offer the following colloquy took place:

> "Mr. Patterson: It seems to me this is material for the reason she testified she was taught from this book, and the best evidence of what she was taught . . .
>
> "The Court: This book is not on trial. Cleveland is on trial.
>
> "Mr. Patterson: She stated she was taught from this book.
>
> "The Court: *There are lots of nefarious books written.* I will exclude that."

The italicized expression was improper, notwithstanding it is undoubtedly categorically correct as a statement of fact. A correct statement of fact may be entirely out of place when made at the improper time or by some person whose duty it is to refrain from making such a remark under the circumstances. A trial judge in a jury trial might be making a correct statement of fact by volunteering that a defendant on trial was tried in his court on some prior occasion and convicted, but the remark would clearly be grounds for a mistrial. The booklet in question here was written by one of the defendants.

The statement without its context and the circumstance which brought it forth would be but an irrelevancy. But when made in response to an argument urging the admissibility of the book and when followed by the statement, "I [fol. 71] exclude that", the jury may well have construed it as a characterization of the publication. Portions of the book has been received in evidence. The court's remark, if construed by the jury as indicated, would constitute a comment on the evidence. In this jurisdiction, such comment is not within the province of the court. State v. Green, 78 Utah 580, 6 P. 2nd 177. And if so understood by the jury, the remark could not be regarded as non-prejudicial. Characterizing as "nefarious" a publication written by a defendant and used by other defendants in what they contended was propagation of religious views,

could not but convey to the minds of the jurors the impression that the court thought that the writer of the book and the propagators of the views therein expressed are iniquitous.

No objection was made nor any exception taken below to this comment. Had there been, and had the implication been called to the court's attention, doubtless the implication would have been erased and any inference therefrom on the part of the jury would have been forefended. Where irregularities are such that a harmful result could not be obviated by any further action, such irregularities may be held ground for reversal, although not excepted to in the trial court. (See People v. Mahoney, 258 P. 607.) But since the indicated implication in the statement of the court was probably not intended, that situation did not present itself. Nevertheless we are constrained to discuss the assignment and to point out its probable prejudicial effect.

Appellants contend that they were denied an impartial jury trial because the judge refused to exclude from the jury panel all members of the Church of Jesus Christ of Latter-day Saints, (for convenience herein called the "Mormon Church"). The judge stated that no one would be excluded from the jury merely by reason of church affiliation. On challenge of some Mormon jurors for alleged bias, on voir dire examination each of them stated that regardless of the emphatic stand of the Morman Church against the advocacy or practice of polygamy, he would try the case according to the evidence and the court's instruction. The charge of bias was not substantiated.

In the effort to impeach said Mormon members of the jury panel for alleged religious prejudice, defense counsel over objection of the prosecution asked such prospective jurors *if they did not know:* (a) That some of the defendants had been excommunicated from said church for advocating or practicing polygamy; (b) That no one is ever excommunicated without a trial at which evidence is produced, and the member charged with disconduct is given an opportunity to defend; and (c) that judgment of excommunication is based [fol. 72] on a finding that the communicant has been guilty of "teaching, preaching or practicing polygamy." Counsel for defendants conveyed to the jurors information that some of the defendants had been found guilty in an ecclesiastical forum of the Mormon Church of either advocating or practicing polygamy. Whatever prejudice might

have been engendered by such defense tactics could not serve as a premise on which to predicate reversible error. Nor could such facts brought into the case by defendants themselves show that individual jurors were biased.

Prejudice is claimed by reason of alleged erroneous questions propounded by the court in the interrogation of jurors, and by reason of certain comments made in relation thereto. The court had a rather exacting job as 89 prospective jurors were examined. Rather early in that process a juror stated that he had formed an opinion as to the guilt or innocence of the defendants, and on further examination stated that "it could be changed" as the case went on; and counsel for defendants subsequently made objection, and in connection with the challenge of a juror for cause, counsel for defendants argued that "if it takes evidence to change that mind he is not eligible. That is the law." To which remark the court responded, "Not in this court, I am sorry to say."

Subsequently, a juror stated that he had formed an opinion as to the merit of the case; that he could not help it, and that his opinion related to the guilt or innocence of defendants. The court then asked: "Is it such an opinion that it would not yield to the facts presented here in the court room before you for your consideration, as a juror?" After objections of counsel the juror answered: "It would take evidence to change my opinion. Does that answer it? I have formed an opinion. I couldn't help it." The court then inquired: "The opinion you now have—could the opinion you now have be removed by the evidence you heard in this court and altered and changed?" He replied: "Yes, sir, by evidence it could." Following considerable argument, the judge said: "Is your opinion (such) . . . that you could lay it aside and consider this case on the evidence presented here, and the instructions of the court, and finally render a fair and impartial verdict based solely upon the evidence produced here in the court room?" The answer was: "By the evidence, yes, sir." The challenge for cause was denied.

A short while later, it appeared that a juror had listened to a discussion of the case. The court asked: "Have you got an opinion now that is of such fixity in your mind that it would not yield to the evidence produced here?" A negative answer was given.

[fol. 73] None of the veniremen whose examination is here discussed served as jurors. They were excused on peremptory challenge. Appellants, however, contend that they were prejudiced by the denial of their aforesaid challenges for cause in view of the fact that they were required to exercise three of their peremptory challenges which might have been interposed to other veniremen who actually served on the jury. Appellants exercised all of their peremptory challenges.

As noted above, the exception taken to the propounded questions of the court was to the effect that if a juror had an opinion which it would take evidence to remove then he could not be an impartial juror since he could not accord to the defendants and each of them the presumption of innocence. Standing alone, the questions set out hereinabove might be construed by the jurors addressed, and the others present who heard the questions, to mean that the jurors might carry with them to the jury room the opinion formed prior to trial and, unless that opinion was changed by the evidence, return a verdict in conformance therewith. It should not be necessary to say that this is, of course, not the law.

However, at the outset of the examination of the jury, the court instructed all of the prospective jurors that those chosen to serve must determine the facts in accordance with the evidence produced in court; that their verdict should be based solely upon that and nothing else. He pointed out specifically that each defendant was clothed with the presumption of innocence and that unless that presumption was overcome by evidence produced in court which proved the guilt of the defendants beyond a reasonable doubt, they were entitled to an acquittal. In such initial discourse to the jury, the following statement by the court was made:

> "The mere fact that you have read about this case in the newspapers or that you have discussed it with others or heard it discussed by others, or that you have formed or expressed an opinion bases solely upon newspaper accounts of the case or gossip or common notoriety, those things in and of themselves do not disqualify you as serving as jurors on the case if you can in spite of that and nevertheless be fair and impartial, put to one side any opinion that you have ever formed based upon the sources that I have indicated."

As to the jurors examined and not excused for cause upon challenge, each had indicated that any opinion that he had formed or expressed was based upon newspaper articles, common notoriety and gossip and that none of them had any direct information with respect to the facts in the case. Of numerous jurors the question was asked as to whether that [fol. 74] juror could lay aside his opinion and consider the case on the evidence presented in court and finally render a fair and impartial verdict based solely upon such evidence. Just prior to the exercise of peremptory challenges, the court again called attention to the presumption of innocence that attended each defendant and asked generally of the panel as to whether there was any one present on the jury who would not be willing to accord each defendant the presumption of innocence until their guilt was proved beyond a reasonable doubt.

In the light of these instructions and comments made by the court subsequest to the answers of jurors in question, we are of the opinion that the jurors could not have been left with the impression that they were qualified to sit as jurors if they entertained an opinion which would require evidence to remove. While the remarks of the court were unfortunate, it appears to us that when the entire picture of events is properly regarded, the effects of the statements complained of were erased from the minds of the jurors. A number of jurors were excused for cause upon challenge, after indicating that they had an opinion relative to the guilt or innocence of the accused which would prevent them from acting impartially in the case.

Section 105-31-21, U. C. A. 1943, provides in part:

". . . but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury founded upon the public rumor, statements in public journals or common notoriety; provided, it appears to the court, upon his declaration under oath or otherwise, that he can and will notwithstanding such opinion act impartially and fairly upon the matters submitted to him."

This provision has been in existence in this state since territorial days and has been construed and applied in numerous cases. See State v. Haworth, 24 Utah 398; People v. Hopt, 4 Utah 247, 9 P. 407, 120 U. S. 430, 7 S. Ct. 614,

30 L. Ed. 708; Thiede v. People, 159 U. S. 510, 40 L. Ed. 237, 16 S. Ct. 62. What we here say should not be construed as in any way departing from the rules therein announced. We are of the opinion that on the whole record, the objections made and exceptions taken, that this assignment of error is not well founded. It is therefore overruled.

In pronouncing sentence, the court announced that the defendants Juanita Barlow and Jean Barlow Darger were under 18 years of age at the time the offense was committed and expressed some doubt as to the jurisdiction of the [fol. 75] court to proceed against those two girls. They were not accused of a felony but an indictable misdemeanor. Sec. 14-7-4, U. C. A. 1943, provides in part:

> "The juvenile court shall have exclusive jurisdiction in all cases relating to the neglect, dependency and delinquency of children who are under eighteen years of age, except in felony cases as hereinafter provided, . . ."

Section 14-7-6, U. C. A. 1943, provides:

> "No child under eighteen years shall be charged with or convicted of a crime in any court except as provided herein. If during the pendency of a criminal or quasi criminal charge against any person in any other court, except felony cases brought before the district courts, it shall be ascertained that said person was under the age of eighteen years at the time of committing the alleged offense, it shall be the duty of such other court to transfer such case immediately, together with a transcript of the proceedings and all the papers, documents and testimony connected therewith, to the juvenile court having jurisdiction. . . ."

As to those two defendants, the case should have been transferred to the juvenile court. While no assignment of error calls our attention to the error committed in trying and sentencing the two named defendants in the district court we take cognizance of that court's want of jurisdiction. The conviction and sentence of Juanita Barlow and Jean Barlow Darger must be set aside.

As to defendants other than the 20 hereinabove specifically named, the judgment is reversed with directions to dismiss as to them. As to the 20 defendants hereinabove specifically named, there is sufficient evidence to support a

judgment of conviction. However, for the reasons hereinabove set out the conviction of Juanita Barlow and Jean Barlow Darger is set aside with instructions to transfer the case as to them to the juvenile court in accordance with the cited statute. The judgment as to the other 18 defendants hereinabove specifically named, against whom the evidence is sufficient, is affirmed.

We concur:

Lester A. Wade, Justice. James H. Wolfe, Justice.

LARSON, *Chief Justice:*

I concur in that part of the opinion upholding the information and declaring that an agreement to counsel, advise and urge other persons to practice polygamy is an agreement within the scope of the conspiracy statute. I concur in the holding that the evidence is insufficient to sustain a verdict against any defendant other than the twenty held by the [fol. 76] prevailing opinion. I agree that as to Juanita Barlow and Jean Barlow Darger the sentence and conviction must be set aside for the reasons stated in the opinion.

Now I note the matters in which I must dissent. I think the questions asked Helen Smith as to what was said to her by her husband relative to Barlow and Musser were in the nature of communications which are confidential under the provisions of Sec. 104-49-3 (1), U. C. A. 1943. However, that does not avail the defendants because: first, no objection was made on the grounds of privileged communication; second, such objection is only available to the other spouse; and third, Heber C. Smith, the husband, is not one of the twenty defendants as to whom we hold there is evidence enough to go to the jury.

I think the opinion is in error on the question involving the competency of certain jurors. To my mind the record compels the conclusion that the trial court was in error in denying the challenge of defendants to such jurors. I fear the effect of the holding of the opinion will be to render any talesman competent to sit as a juror if he says he will try the case fairly and impartially even though he has a fixed and determined opinion of defendant's guilt or of his innocence as unmovable as Gibraltar. During the examination of talesman as to his qualifications to sit as a juror, when the talesman stated that he had formed an opinion as to the merits of the case, the court asked: "Is it such an opinion

that it would not yield to the facts presented here in the court room before you for your consideration?" The talesman answered: "It would take evidence to change my opinion." The court then asked: "The opinion you now have, could the opinion you now have be removed by evidence you heard in this court, and altered and changed?" And the answer was: "Yes, by evidence it could." The challenge to the juror was denied.

Another talesman who had formed an opinion on the merits stated that "it could be changed; as the case went on, it could be changed." Challenge to such juror was also denied. At least three jurors were of this type. It seems elemental to the writer that a talesman who has an opinion on the question to be decided by the jury, which opinion requires evidence to change or remove, is ipso facto disqualified as a juror. Of course, jurors are not required to be blank minds, but they should be men with free and open minds; men who can enter the jury box at the beginning of the evidence utterly disregarding and oblivious to any thing they may have heard or read, or any opinions or impressions they have formed. The question is not: Can your opinion be changed, but can you utterly disregard your opinion? It is not as to whether the opinion is of such fixity that it cannot be changed by evidence, but is it of such fixity that you cannot disregard it without any evidence? As far as [fol. 77] such juror is concerned the party litigant comes to the batter's box with two strikes charged against him. It is small consolation to say: "If you knock a home run on the first ball pitched, the handicap of two strikes against you before you came to bat didn't hurt you." Who would contend that in a championship basket ball game it is fair to give one team, as the game opens, ten free throws at the basket, saying to the other team: "If you can score enough field baskets more than your opponents to offset the ten free throws, why you win anyway so you can't complain?"

The rule as laid down by the overwhelming weight of authority, and as repeatedly declared in this jurisdiction is, a talesman is not disqualified as a juror because he has formed or expressed an opinion as to the guilt or innocence of the accused if such opinion is one that the juror can and will completely lay aside and disregard so he can try the case fairly and impartially upon the evidence submitted in open court like he would if be had heard nothing of the case or formed no opinion whatever. In People v. Hopt, 4 Utah

247, 9 P. 407, 120 U. S. 430, 7 S. Ct. 614, 30 L. Ed. 708, the question was raised as to a denial of a challenge of a juror for implied bias. The Utah court disposed of the matter on the ground that when the jury was sworn the defendant had three unused peremptory challenges and so could not complain. The United States Supreme Court affirmed on the same ground. It should be borne in mind that both courts point out that the juror, Abbott, testified that while he had long before formed an opinion based upon what he read in the newspapers "he could go into the jury box and sit as if he had never heard of the case" and that unless "what he had heard before turned out to be the facts in the case he had no opinion, and that he could sit on the jury and try the case without reference to anything he had heard." In Thiede v. Utah, 159 U. S. 510, 40 L. Ed. 237, 16 S. Ct. 62, the court disposes of the question thus: "These jurors testified substantially that at the time of the homicide they had read accounts thereof in the newspapers, and that some impression had been formed in their minds from such reading, but each stated that he could lay aside any such impression and try the case fairly and impartially upon the evidence." In State v. Haworth, 24 Utah 398, 66 P. 155, four of the challenged jurors had formed no opinion as to the guilt or innocence of the accused. It did appear they had formed an opinion that deceased had been murdered. (A point on which there was no dispute.) One juror stated that from what he had read he had formed an *opinion or impression* as to the guilt or innocence of the accused, but that he could *weigh the evidence independently of what he* [fol. 78] *had read and heard* and would not be influenced by such matters or opinions formed therefrom. These jurors were held not disqualified. They all come with the rule for which the writer is contending.

> "A person who has formed an opinion by conversation with witnesses is, under Neb. Crim, Sec. 468, incompetent to sit as a juror, notwithstanding he may swear that he can render a fair and impartial verdict." Cowan *v.* State, 22 Neb. 519.
>
> "A juror is not disqualified because he has formed an opinion of greater or less strength from what he has read in newspapers, if he testifies that he can render a verdict according to the evidence, uninfluenced by previous opinions." Rizzolo v. Com., 126 Pa. 54; West v.

State, 79 Ga. 773; Garlitz v. State, 71 Mo. 293, 4 L. R. A. 601; People v. Gage, 62 Mich. 271.

"A juror having an opinion in a case, and whose declaration that he could render an impartial verdict is qualified by a doubt, is incompetent, under N. Y. Code Crim. Proc., Sec. 376." People v. McQuade, 110 N. Y. 284, 1 L. R. A. 273.

"A juror stating that he is prejudiced in defendant's favor, but that he can find a verdict upon the evidence alone, is properly rejected on a challenge for cause." Giebel v. State, 28 Tex. App. 151.

"The statement of a juror on cross-examination, that he thinks he can try the case fairly and impartially and render an impartial verdict from the evidence, without being biased by his previously formed opinion, although it will take evidence to remove it, renders his rejection a matter within the discretion of the trial judge." Young v. Johnson, 123 N. Y. 226, affirming 46 Hun. 164.

"The opinion which renders a juror incompetent must be such as would influence his judgement." Spangler v. Kite, 47 Mo. App. 230.

"A juror called in a murder case is not incompetent because he heard talk about the case at the time of the offense, and may then have had opinion, where he stated that *he has no opinion at the time of the trial,* stands impartial, and can give the prisoner a fair trial." Lyles v. Com., 88 Va. 396. (Italics ours.)

"One who has formed an opinion which it will require evidence to remove is disqualified for actual bias as a juror in a murder trial, although he states that he will try the case on the evidence and the law." State v. Coella, 3 Wash. 99; contra. Com. v. McMillan, 144 Pa. 610.

"A juror who has formed and expressed a positive opinion of the guilt of a prisoner, and of certain specific and material facts, although it is based solely on newspaper accounts, is disqualified, even if he declares that he can render a fair and impartial verdict upon the evidence alone." Coughlin v. People, 144 Ill. 140, 19 L. R. A. 57.

(Above quotations 40 L. Ed., pages 238, 239.)

We quote from the syllabus in Scribner v. State (Okla.) 108 P. 422:

"The opinion necessary to disqualify a juror must be one based on what purports to be facts, and one that will combat the evidence.

"The trial court is not limited by the answers made by the juror, but must be satisfied from all of the circumstances as well as the examination that the juror is not prejudiced against the accused.

"Where the juror says that he has an opinion, the accused should be given an opportunity to examine him fully as to the extent of his opinion."

[fol. 79] In the concurring opinion of Mr. Justice Furman, we read:

"When a juror states that he had an opinion as to the guilt of a defendant, he is not made competent to sit in the case merely because he may state that he can and will lay this opinion aside if taken on the jury, and give the defendant a fair and impartial trial, and be governed alone in making up his verdict by the testimony of the witnesses and the charge of the court. The juror is not the judge of his own competency, of his own impartiality, and of his own freedom from prejudice. No statute can clothe him with such judicial discretion and power. . . . It is the judge, and not the juror, who is charged with the duty of passing upon the competency of the juror, and in the discharge of this duty the judge may have recourse to any means of information within his power. In fact, he should carefully investigate every source which would be calculated to throw any light upon the competency of a juror, and if the judge is not entirely satisfied of the competency of the juror, he should be excused. In re Johnson v. State, Okla. Crim. 348, 97, P. 1070.

". . . . The court erred in not permitting this question to be answered. While it is true that the court would not be bound by answers of the juror, yet, when it is disclosed that a juror has an opinion, in all fairness the court should permit the most searching cross-examination of the juror as to the origin, extent and probable effects of such opinion. . . . But it may be said that the defendant is guilty, and that therefore it is immaterial

as to whether the law was complied with. Such a statement as this is the first step toward lynch law, and if recognized by this court, would wipe out and destroy every constitutional right, and would establish a precedent which, if followed, would result in arbitrary punishment in the name of the law, ..."

The question as to the juror's qualification is not if his opinion will yield to evidence but, can he lay it aside and disregard it so as to give the evidence its proper weight on the question: Is guilt proved? without wasting part of its strength and force in overcoming preconceived opinions on that matter? In other words, not can the opinion be overcome by evidence, but can and will the juror disregard such opinion and weigh the evidence fairly and impartially? I think the trial court erred in turning down the suggestion and request of defense that the state of mind of these jurors, and the fixity of their opinion be further explored before they be accepted as jurors. On the record as it stands, I think these jurors were disqualified and incompetent to sit as jurors, and the cause should be reversed.

There are two other matters in the record I think were error but since no exception was taken to them below, they need not be discussed.

Pratt, Justice; not participating.

[fols. 79a-95] IN THE SUPREME COURT OF THE STATE OF UTAH

Regular October Term, 1946

No. 6816

THE STATE OF UTAH, Respondent,

v.

JOSEPH WHITE MUSSER, et al., Appellants

JUDGMENT—December 16, 1946

This cause having been heretofore argued and submitted and the court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of conviction against Joseph White Musser, Guy W. Musser,

Charles Frederick Zitting, Heber Kimball Cleveland, Zola Chatwin Cleveland, Jonathan M. Hammon, Ross Wesley LeBaron, John Y. Barlow, Albert Edmund Barlow, Edmund Francis Barlow, Ianthius Barlow, Louis A. Kelsch, Dr. Rulon Clark Allred, David B. Darger, Rulon T. Jeffs, George H. Kalmar, Joseph Lyman Jessup, and Alma A. Timpson, be, and the same is, affirmed; the judgment of conviction against Juanita Barlow and Jean Barlow Darger is set aside with instructions to transfer the case as to them to the Juvenile Court. It is further ordered that the judgment against the remaining defendants be, and the same is, reversed with directions to dismiss as to them.

[fols.95A-96] IN THE SUPREME COURT OF THE STATE OF UTAH
REGULAR FEBRUARY TERM

No. 6816

THE STATE OF UTAH, Respondent,

v.

JOSEPH WHITE MUSSER, et al., Appellants

ORDER DENYING REHEARING—February 18, 1947

On consideration of the petition for rehearing heretofore filed herein and the arguments of counsel thereupon had, it is now ordered that a rehearing be, and the same is, denied.

[fol. 97] [File endorsement omitted]

IN THE SUPREME COURT OF UTAH

[Title omitted]

PETITION FOR APPEAL—Filed February 19, 1947

Come now the foregoing named appellants and state, that on the 16th day of December, 1946, the Supreme Court of the State of Utah entered a final decision affirming their conviction by the Court below, and, thereafter, to wit, on the 18th day of February, 1947, it denied a petition for rehearing in said cause; and the appellants, feeling ag-

grieved at the decision of the Supreme Court of the State of Utah, affirming said judgment of conviction, pray that they may be allowed an appeal to the Supreme Court of the United States for a reversal of said judgment and decision, and that a transcript of the record in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

The petitioners submit and present to this honorable Court herewith a statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain an appeal in this cause.

[fols. 98-113] Joseph White Musser, Guy W. Musser, Charles Frederick Zitting, Heber Kimball Cleveland,, Zola Chatwin Cleveland, Jonathan M. Hammon, John Y. Barlow, Albert Edmund Barlow, Edmund Francis Barlow, Ianthius Barlow, Louis A. Kelsch, Dr. Rulon Clark Allred, David B. Darger, Jean Barlow Darger, Rulon T. Jeffs, George H. Kalmar, Joseph Lyman Jessup, Alma A. Timpson, By Claude T. Barnes, Counsel for Appellants and Petitioners.

[fol. 114] [File endorsement omitted]

IN THE SUPREME COURT OF UTAH

[Title omitted]

ASSIGNMENTS OF ERROR—Filed February 19, 1947

Come now the foregoing appellants by their attorney of record, and assign that in the final decision of the Supreme Court of the State of Utah, rendered in said cause on December 16, 1946, on which rehearing was denied on the 18 day of Feb., 1947, there is manifest error against the just rights of all of the said appellants, in this, to wit:

1

Contrary to the provisions of Amendments 1 and 14 to the Constitution of the United States, the Court has decided:

(a) That one may not *advocate* the practice of a religious belief in a plurality of wives.

(b) That one may not *teach* the practice of a religious belief in a plurality of wives.

(c) That one may not *counsel* the practice of a religious belief in a plurality of wives.

(d) That one may not *advise* the practice of a religious belief in a plurality of wives.

[fol. 115] (e) That one may not *urge* other persons to practice a religious belief in a plurality of wives.

(f) That one may not with others establish a church in which original Mormonism is advocated, including among many religious doctrines, the tenet, that a plurality of wives is essential to exaltation in the celestial kingdom of God; nor may citizens peaceably assemble thereat to express and advocate views.

(g) That it is unlawful to read from the Doctrine and Covenants, (a Mormon religious work which has been published for a hundred years) the 132nd Section, which states that a plurality of wives is essential to salvation; and to assert that such is the commandment of God applicable today.

(h) That it is unlawful to publish a religious book, pamphlet or magazine setting forth the belief that it is necessary to practice having a plurality of wives now to gain celestial glory.

(i) That to do any of the foregoing with others is a conspiracy against public morals.

(j) It has failed to distinguish between the advocacy of a religious belief and the actual practice thereof.

(k) It has denied the defendants the right of assembly in a house of worship wherein their belief in a divine commandment of a plurality of wives was expressed only incidentally in their general Christian worship.

(l) It has held that "an agreement to advocate, teach, counsel and advise other persons" to practice polygamy is an agreement to commit acts injurious to public morals.

(m) It has disregarded United States v. Barlow, 56T, Supp. 795; 323 U. S. 805, 65 S. Ct. 25, (all of whose defendants except one are included among the defendants here), wherein the Federal Court decided that to urge, teach and advocate the practice of plural marriage is not injurious to public morals. That case is virtually *stare decisis* here, but

the conclusions are directly opposite in the same jurisdiction; and freedom of the press is at stake. Is it a crime to read the Doctrine and Covenants, which has been published in Utah for a hundred years, and claim that its doctrines are applicable now?

(n) The Court has furthermore, held that prospective jurors with fixed opinions against the defendants, and members of a church fighting the defendants are nevertheless not subject to peremptory challenge if they state that their opinion, fixed as it is, could be overcome by evidence, all of [fols. 116-119] which denied the defendants due process of law under the Constitution of the United States Amendment 14, and Article 5.

(o) Disregarding the lessons of American history, when sects are advocating "healers" instead of doctors, even in cases of contagious disease, this Court has said that one may not advocate, teach, counsel, urge or advise a religious practice and belief. The first and the fourteenth amendments to the Federal Constitution droop before such an assertion.

(p) The rights of freedom of worship, assembly, speech, and press, are by this decision assailed; and due process of law in the selection of jurymen has been flagrantly denied.

Claude T. Barnes, Counsel for Appellants.

[fol. 120] [File endorsement omitted]

IN THE SUPREME COURT OF UTAH

[Title omitted]

ORDER ALLOWING APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed February 19, 1947

This cause having come on this day before the court on petition of all the foregoing Appellants, claiming right to appeal to the Supreme Court of the United States for reversal of the final decision of this Court rendered December 16, 1946, and a denial of a petition for rehearing thereon entered February 18, 1947, and that a duly certified copy of the record in said cause be transmitted to the Clerk of the Supreme Court of the United States; and the Court having heard and considered said petition, together with the appel-

lants' statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain an appeal in said cause, the same being duly filed with the Clerk of this Court, it is, therefore, by the Court ordered and adjudged, that the Appellants herein be and they are hereby allowed an appeal from the final decision and judgment of this Court affirming the judgment of the Court below, to the Supreme Court of the United States, and that a duly certified copy of the record in said cause be transmitted to the Clerk of the Supreme Court of Washington, D. C.

[fols. 121-125] It is further ordered that the appellants be and they are hereby permitted a period of sixty days in which to file the record and docket the said appeal to the Supreme Court of the United States.

In consideration of the allowance of said appeal and the fact that the bonds already filed by the appellants are continuing bonds covering appeal until final judgment, it is further ordered that the said writ shall operate as a stay of the sentences and judgments upon the appellants heretofore imposed by the District Court of the Third Judicial District of Salt Lake County, State of Utah, until the further order of this Court.

It is further ordered that the defendants give security for costs in the amount of $750.00.

Dated at Salt Lake City, State of Utah, this 19th day of February, 1947.

Roger I. McDonough, Chief Justice of the Supreme Court of the State of Utah.

[fol. 126] [File endorsement omitted]

IN THE SUPREME COURT OF UTAH

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed March 7, 1947

To L. M. Cummings, Esq., Clerk of the Supreme Court of the State of Utah:

You are hereby requested to make a transcript of the record in the foregoing cause, to be filed in the Supreme Court of the United States pursuant to the allowance of an

appeal by the Chief Justice of the Supreme Court of Utah, and include in such transcript of record the following:

1. Information.
2. Motion to Quash.
3. Order Denying Motion to Quash.
4. Defendants' Motion to Dismiss as to All Defendants.
5. Defendants' Requests Nos. 16, 24, 36, 42. (No others).
6. Court's Instructions, No. 1, the last paragraph of No. 4, No. 5, No. 9. (No others).
7. Verdict.
8. Notice of Motion for New Trial.
9. Motion for Judgment of Not Guilty Non Obstanto Veredicto (copy only one).
10. Judgment of the Court.
11. Notice of Appeal.
12. Copy the following assignments of error taken from Appellants' Brief: 1, 9, 11, 14, 15, 18, 20, 21, 25, 30, 34, 36, 37, 38, 74, 177-186.

[fols. 127-129] 13. Opinion of the Supreme Court.

14. Judgment of the Supreme Court.
15. Petition for Rehearing.
16. Petition for Appeal to Supreme Court of the United States.
17. Statement of Jurisdiction.
18. Assignment of Error.
19. Minute Entry Showing Cost Bond ($750) Filed and Approved by Chief Justice.
20. Order Allowing Appeal.
21. Citation.
22. Notice and Service on Attorney General.
23. This Praecipe for Transcript of Record.
24. Certificate of Clerk.

Also please make the following quotations from the official Court Reporter's transcript of the trial and proceedings. (The numbers refer to the page numbers of his official transcript):

Page 80—Copy from the — on p. 80 to — p. 88.

P. 136—Copy from the — on p. 136 to the — on p. 140.

P. 486 and down to the — on p. 500.

P. 577 from — to — on p. 580 (direct examination of Helen G. Smith).

Cross examination of Helen G. Smith from — on p. 632 to end of p. 643.

Wherever motions by individual defendants are alike in wording, one copy will suffice, with that notation.

Said transcript of record should be prepared as required by law and the rules of this Court and the rules of the Supreme Court of the United States, and to be filed in the office of the Clerk of the Supreme Court of the United States within the time permitted by law after the order allowing the appeal.

Dated this 5th day of March, 1947.

Claude T. Barnes, Counsel for Appellants.

Service of the foregoing praecipe acknowledged this 7th day of March, 1947:

Grover A. Giles, Attorney General of Utah. By Ethel Leonard.

[fol. 130] APPENDIX ATTACHED TO THE RECORD

UNITED STATES DISTRICT COURT, DISTRICT OF UTAH, CENTRAL DIVISION

No. 14479

Criminal

UNITED STATES OF AMERICA, Plaintiff,

v.

JOHN Y. BARLOW, et al., Defendants

MEMORANDUM OPINION ON DEFENDANTS' MOTION TO QUASH INDICTMENT

This matter is before me on defendants' motion to quash the indictment. Several grounds are set forth. Being of the opinion that the first ground, to wit, that the indictment be quashed and set aside because it does not state a Federal offense, is good, it will not be necessary to discuss other grounds set out in the motion.

The indictment charges a group of defendants with conspiring to commit an offense against the United States, Sec. 88, Tit. 18, U.S.C.A. (Sec. 37 Crim. Code). The object of the conspiracy as charged is to violate Sec. 334, Tit. 18, U.S.C.A. (Sec. 211 Crim. Code), as amended, which denounces as a crime the mailing of obscene matter, and is in part as follows:

> "Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publications of an indecent character, * * * is hereby declared to be nonmailable matter * * *. Whoever shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable * * * shall be fined * * *," etc.

The facts alleged in the indictment are: The defendants in order to carry out the conspiracy after it was formed, mailed out to certain parties named copies of a publication entitled "Truth," published monthly by the Truth Publishing Company in Salt Lake City. By agreement of counsel several editorials from this publication of different months —which form the gravamen of the Government's case and which it claims contain nonmailable matter under the above statute—were submitted to the court on the understanding they constitute the proof that the Government would offer [fol. 131] in support of the charges. These editorials simply advocate the restoration of "celestial or plural marriage," stating that the Lord has restored the principle thereof.

A sample editorial from said publication for the month of April, 1943—which the Government says is typical of all and which it is claimed is within the prohibition of the statute as being lewd, lascivious and filthy—is as follows:

> "The Lord restored the principle of Celestial or plural marriage in line with His promise that in this the last dispensation there would be a restitution of all things and that there should be no taking away again. Plural marriage is one of the laws of Heaven that has been restored never again to be taken from the earth or given to another people. It is a law that cannot be abrogated, modified, or postponed. The hackneyed claim that the Woodruff Manifesto of 1890 was given by revelation

from the Lord to abrogate His law of Plural Marriage has been exploited by the leaders to a shocking degree, and as often has been exploded. Any person with 8th grade intelligence reading the Manifesto will discover nothing in it savoring of revelation, or as an injunction from the Lord against the continued practice of the principle. True, the subsequent interpretation given it by Wilford Woodruff, while under pressure by the enemy, and so far as it was ratified by the Church, bound the Church to a monogamic marriage system. But it was the Church that was bound, and not God."

The statute in question provides that the obscenity, lewdness or lasciviousness be contained in a book pamphlet, picture, paper, letter, writing, printing or other publication and be of an indecent character.

The argument of the Government, as I understand it, is that these editorials—of which a fair sample is the quotation supra—by advocating the practice of polygamy, comes within the definition found in *Swearingen* v. *U. S.* 161 U. S. 446, p. 451,

> "The words 'obscene,' 'lewd,' and 'lascivious' as used in the statute signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel * * * ."

In other words it is a violation of the law to advocate through the mails plural marriages, because in so doing the defendants necessarily advocate the violation of law and incite thoughts of sexual impurity and practices in many of their readers.

A careful reading of the editorial discloses no obscene or filthy word or expression of lewd suggestion is used or contained therein. It is restrained and nothing more than an argument in favor of a practice that for many years was a tenet of the Mormon Church, until abolished as a condition [fol. 132] of the admission of Utah to statehood. I cannot see how any word or sentence in these editorials submitted to the court can be denominated as lasciyious, or of a nature to excite erotic feelings or thoughts in the mind of the ordinary reader, or as tending to deprave public morals, or lead to impure purposes or practices.

As stated in *Knowles* v. *U. S.*, 170 Fed. 409:

> "* * * the only question before us is whether the article is obscene, lewd, or lascivious within the meaning of the statute." That: "In all indictments under this statute there is a preliminary question for the court to say whether the writing could by any reasonable judgment be held to come within the prohibition of the law."

P. 412:

> "The true test to determine whether a writing comes within the meaning of the statute is whether its language has a tendency to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands it may fall, by arousing or implanting in such minds obscene, lewd or lascivious thoughts or desires."

In the *Swearingen* case, 161 U. S. (supra), the defendant, a publisher, was indicted for having mailed copies of his newspaper containing an article that was a very bitter personal attack upon a person described, describing him in the most abusive terms, i.e.:

> "a mental and physical bastard, a black hearted coward, a liar, perjurer, and slanderer, who would sell a mother's honor with less hesitancy and for much less silver than Judas betrayed the Saviour. Time and again has he proven a wilful, malicious and cowardly liar."

The Supreme Court held that the article in question was not obscene and non-mailable, the Court saying, p. 450:

> "The offense aimed at, in that portion of the statute we are now considering, was the use of the mails to circulate or deliver matter to corrupt the morals of the people. The words 'obscene,' 'lewd,' and 'lascivious,' as used in the statute, signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel. *As the statute is highly penal, it should not be held to embrace language unless it is fairly within its letter and spirit.*" (Emphasis ours).

The court held that the whole article was exceedingly coarse and vulgar. It could not perceive anything in it of a lewd, lascivious and obscene tendency, calculated to corrupt and debauch the minds and morals of those in whose hands it might fall.

A reading of the publication here involved forces us to the same conclusion. As stated, it is nothing more than advocacy of a certain practice that was once part of the religion of the Mormon Church, and which this group of [fol. 133] defendants still advocates. There is nothing in it that comes within the language of the Swearingen case, or which tends to corrupt and debauch the minds and morals of those in whose hands it might fall.

The Supreme Court passed upon this same statute later in U. S. v. Limehouse, 285 U. S, 424, wherein the defendant was charged with sending out certain filthy letters and writings through the mails, containing charges of sexual immorality and miscog-nation and similar practices. The Court found the language was coarse, vulgar and unquestionably filthy within the popular meaning of that term, and following the Swearingen case (supra), held that in order to constitute a crime the language must be

> "calculated to corrupt and debauch the mind and morals of those in whose hands it might fall."

In McKnight v. U. S. 78 Fed (2d) 931, it was held (syllabus 2):

> "Court in considering indictments under statute prohibiting mailing of libelous and indecent matter must first determine as matter of law whether writing complained of could by any reasonable judgment be held to come within prohibition of law."

And the statute being penal must be strictly construed.

The court takes judicial notice that the Mormon Church for many years advocated polygamy, and in so doing used the mails to disseminate its literature, advocating "celestial or plural marriages". Such a use of the mails has continued for many years without molestation, and has never before been questioned. In the interpretation of a doubtful and ambiguous statute—a uniform administration practice by the authorities in respect thereto over a considerable period of time carries weight with the court,

especially where, as here, thousands of good citizens sincerely and honestly believe in it as part of their religion.

It was quite natural that when the Congress forbade plural marriages and the church agreed to submit to those laws many of the follows of the Mormon faith felt that they could not conscientiously and sincerely change their beliefs in the face of what they considered the direct command of God to the contrary. The constitution of Utah prohibits polygamous or plural marriages. It might well be said that any prosecution for violations thereof under our theory of government is a purely local matter for the state rather than the Federal Government, in the absence of a widespread violation of the law.

In conclusion, it might be said that the natural reaction [fol. 134] to reading a publication setting forth that polygamy is essential to salvation is one of repugnance and does not tend to increase sexual desire or impure thoughts. We also bear in mind that one cannot pick up a national magazine, or go to the theatre or movie without being confronted with illustrations and advertisements that tend more to incite sexual desire than do any of the publications in this magazine that have been called to our attention. In fact sex incitement is a selling point of innumerable publications and advertisements that pass without comment or prosecution.

It follows that the motion to quash the indictment should be granted and the indictment dismissed, and

It Is So Ordered:

J, Foster Symes, U. S. District Judge Assigned Sitting Within and For the District Court of the United States for the District of Utah, Central Division.

March 18, 1944.

[fol. 135] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS AND DESIGNATION OF RECORD—Filed March 31, 1947

The Appellants adopt their Assignments of Error (Record 0114) as Their Statement of Points.

It will *not* be necessary to print the following: Appeal Bond (R. 0117); Certificate of Clerk (0128); Citation On

Appeal (0122); Judgment of the Supreme Court of Utah (0080); Notice of Appeal to Utah S. Ct. (0050); Notice to Attorney General (0124); Verdict of Jury (0043); Order (0005); Judgment (0048).

The Exhibit at the end of the Record, containing the opinion of Hon. J. Foster Symes, U. S. Dist. Court, in a similar case in the Federal Court against the same (in most part) defendants should be printed.

Claude T. Barnes, Counsel for Appellants.

Received copy this— day of March, 1947.
Grover A. Giles, Attorney General of Utah By
——— ———.

[fol. 136] Affidavit of Service

STATE OF UTAH,
County of Salt Lake, ss:

Royal C. Barnes being first duly sworn deposes and says That I am employed in the office of Claude T. Barnes, Salt Lake City, Utah; that on the 26th day of March, 1947, I placed a copy of the attached Statement of Points in an envelope addressed to Hon. Grover A. Giles, Attorney General of the State of Utah, State Capitol, Salt Lake City, Utah; and placed the same with postage fully prepaid thereon in the United States postoffice at Salt Lake City, Utah. There is a daily mail service between the place of mailing and the State Capitol.

Royal C. Barnes.

Subscribed and sworn to before me this 26 day of March, 1947. Claude T. Barnes, Notary Public. My Commission Expires June 29, 1949. Residing at Salt Lake City, State of Utah. (Seal.)

[fol. 137] IN THE SUPREME COURT OF THE UNITED STATES

SUPPLEMENT TO STATEMENT OF POINTS—Filed March 31, 1947

The Appellants do not deem it necessary for the Clerk to have printed the Petition for Rehearing and Citation of Authorities thereon, filed before the Supreme Court of the State of Utah.

Claude T. Barnes, Counsel for Appellants.

STATE OF UTAH,
County of Salt Lake, ss:

Royal C. Barnes being first duly sworn deposes and says: That I placed a copy of the foregoing Supplement to Statement of Points in an envelope addressed to Hon. Grover A. Giles, Attorney General of the State of Utah, State Capitol, Salt Lake City, Utah, and on the 27th day of March, 1947, deposited the same with postage fully prepaid in the United States Post Office in Salt Lake City, Utah, from which point there is a daily mail service to the State Capitol.

Royal C. Barnes.

Subscribed and sworn to before me this 27 day of March, 1947. Claude T. Barnes, Notary Public. My Commission Expires June 29, 1948. Residing at Salt Lake City, State of Utah. (Seal.)

[fol. 137a] [File endorsement omitted.]

[fol. 138] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—April 28, 1947.

The statement of Jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on cover: Enter Claude T. Barnes, File No. 52,052, Utah, Supreme Court, Term No. 1188. Joseph White Musser, Guy. W. Musser, Charles Frederick Zitting, et al., Appellants, vs. the State of Utah. Filed March 31, 1947, Term No. 1188, O. T. 1946.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1188 60

JOSEPH WHITE MUSSER, GUY W. MUSSER, CHARLES FREDERICK ZITTING, ET AL.,
Appellants,

vs.

THE STATE OF UTAH

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

STATEMENT AS TO JURISDICTION

CLAUDE T. BARNES,
Counsel for Appellants.

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SUPREME COURT OF THE STATE OF UTAH

No. 6816

THE STATE OF UTAH,
Plaintiff and Respondent,

vs.

JOSEPH WHITE MUSSER, GUY W. MUSSER, CHARLES FREDERICK ZITTING, HEBER KIMBALL CLEVELAND, ZOLA CHATWIN CLEVELAND, JONATHAN M. HAMMON, JOHN Y. BARLOW, ALBERT EDMUND BARLOW, EDMUND FRANCIS BARLOW, IANTHIUS BARLOW, LOUIS A. KELSCH, DR. RULON CLARK ALLRED, DAVID B. DARGER, JEAN BARLOW DARGER, RULON T. JEFFS, GEORGE H. KALMAR, JOSEPH LYMAN JESSUP AND ALMA A. TIMPSON,
Defendants and Appellants

STATEMENT CONCERNING JURISDICTION

Filed February 19, 1947

In compliance with Rule 12 of the Supreme Court of the United States, the foregoing defendants and appellants submit their assertion of the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final judgment of the Supreme Court of Utah entered in this cause on December, 1946, and also its

denial of a petition for rehearing entered on the 18 day of February, 1947, both of which decisions affirm the conviction of the defendants in the District Court of Salt Lake County, State of Utah. Petition for the allowance of said appeal was filed on the 19th day of February, 1947; and is presented to the Supreme Court of the State of Utah herewith.

I

Jurisdiction

The jurisdiction of the Supreme Court of the United States to review the judgment and decision entered in this cause is conferred by Act of Congress of March 3, 1911, as amended by Act of February 13, 1925, c. 229, 43 Stat. 937, 28 U. S. C. A. paragraph 344 (Judicial Code, Section 237, Amended), commonly known as "Appellate jurisdiction of decrees of State Courts".

The pertinent part of the statute of the State of Utah herein considered is as follows (103-11-1 Code 1943):

> "If two or more persons conspire: . . . (5) To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice or the due administration of the laws;—they are punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding $1,000."

II

The provisions of the Constitution of the United States the interpretation and applicability of which are involved here are:

Amendment 1.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble,

and to petition the government for a redress of grievances."

Amendment 14, Sec. 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

III

Judgment and Decision Involved

The decision involved in that rendered by the Supreme Court of the State of Utah on December 16, 1946, which opinion is made a part hereof, together with the opinion denying the petition for rehearing.

All of the appellants were prosecuted in the District Court of Salt Lake County, State of Utah, under information charging them under Sec. 103-11-1(5), Utah Code Ann. 1943, with conspiracy:

> "to advocate, promote, encourage, urge, teach, counsel"

plural marriage and unlawful cohabitation.

Overt acts were alleged to be (a) the purchase of a church house; (b) the publication of Truth magazine; and (c) an attempt to convert one Helen Smith.

In all, eleven overt acts were charged, including one to the effect, that the defendants practiced polygamy, but for lack of evidence all overt acts were taken from the jury except the foregoing; and the Supreme Court of Utah eliminated the one with reference to Truth magazine, thus

leaving only the purchase of a church house and an attempt to convert one woman.

We are thus confronted squarely with a denial of the Constitutional and sacred rights of freedom of speech, press, worship and assembly. This is a case wherein the defendants have been found guilty of *expressing* their religious views, *not for practicing them.* The gist of it appears in the final opinion of the Supreme Court of Utah as follows:

> "We therefore hold that an agreement to advocate, teach, counsel, advise, and urge other persons to practice polygamy and unlawful cohabitation is an agreement to commit acts injurious to public morals within the scope of the conspiracy statute."

This is not a case of conspiracy to *practice* polygamy but *to speak* concerning it; and it thus goes to the very foundation of our government with the rights and immunities of citizens under the Constitution of the United States, the watchguard of which is the Supreme Court of the United States. Is it a crime to say that one believes in the religious doctrine of plural marriage, and to teach that belief? One million citizens make this a substantial question, for their right to continue to publish their Doctrine and Covenants is herein involved.

Conspiracy is, of course, an agreement to do either: (a) a lawful thing by unlawful means; or (b) an unlawful thing by lawful means. To purchase a church house; to attempt to persuade, are, of course, lawful acts; so we are here concerned with an agreement to do a supposed unlawful thing by lawful acts. The thing to be done must be unlawful, whether by one or more persons; so, under the decision, we are confronted by this proposition:

1. That is it unlawful for one person to do either of the following:

   (a) to *advocate* polygamy as a religious practice.
   (b) to *teach* polygamy as a religious practice.

(c) to *counsel* polygamy as a religious practice.
(d) to *advise* polygamy as a religious practice.
(e) to *urge* others to practice polygamy.

(The word "polygamy" is used to cover plurality of wives and unlawful cohabitation—the Supreme Court of the United States is fully informed on technical distinctions. See *U. S.* v. *Cleveland, et al.*, 1946 Fall term, 65 S. Ct. 858).

In the lower Court, by motions to quash, motions to dismiss, motions for a new trial; and in the Supreme Court of Utah on appeal in their briefs and petition for rehearing the appellants repeatedly raised their constitutional rights under the First and Fourteenth Amendments to the Federal Constitution with reference to freedom of religion, press, assembly and speech, but they were uniformly denied.

The information was originally against 33 persons who, over their objection were tried by jurymen who belonged mostly to an opposing religious sect and had admittedly formed opinions against the defendants, who were, of course, found guilty and sentenced to one year's imprisonment each. The Supreme Court eliminated all but the appellants.

It was a straight case of punishing people for believing and preaching the original and complete doctrines of Mormonism; and they were tried by their devout opponents in Mormonism.

The Supreme Court of Utah took the theory that it is unlawful even *to advocate* a plurality of wives as a religious doctrine.

It did that notwithstanding the question was *stare decisis*.

These defendants were charged with the commission of acts injurious to public morals in that they advocated and taught polygamy. In the Federal case (*U. S.* v. *Barlow*, D. C. Utah, 1944, 56 F. Supp. 795, U. S. appeal dismissed, 65 S. Ct. 25, 89 L. Ed. —) the defendants (most of them the actual defendants here) were charged with mailing Truth

magazine in which "plural marriages were to be and were advocated and urged, thereby tending to deprave and corrupt the morals of those whose minds were and are open to such influences" (Quoted from the indictment in case 14479 U. S. Dist. Ct., Utah, the *Harlow* case, *supra*).

In other words, in that case and in this one the ultimate fact to be determined was: Is the advocacy of the practice of polygamy contrary to public morals? Actually the charges are identical, for in this case an overt act is that the defendants "did publish and cause to be published once each month a pamphlet known as Truth."

In both cases the charge was publishing Truth which advocated the practice of polygamy. The decision in the Federal case read in part:

> "A reading of the publication here involved forces us to the same conclusions. As stated it is nothing more than advocacy of a certain practice that was once part of the religion of the Morman Church, and which this group of defendants still advocates. There is nothing in it * * * which tends to corrupt and debauch the minds and morals of those in whose hands it might fall."

Dissatisfied with that decision the U. S. government appealed that case directly to the Supreme Court of the United States, where, upon the invitation of the Solicitor General, the parties stipulated a dismissal of the appeal. What could be stronger *stare decisis?*

So closely allied are the two decisions—involving the same defendants, the same publication, the same printed expressions—that we have appended hereto the opinion of the Federal Court *in extenso:*

Amendment XIV to the Federal Constitution reads in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

The First Amendment detailed what the Federal government could not do, the Fourteenth, what the states could not do. What are those "privileges and immunities?" We shall not discuss some of those fundamental rights such as those against unreasonable search, cruel punishment, self-incrimination, discriminatory legislation, or those for confrontation with witnesses, contract, due process, inheritance, voting, and the like, but shall confine ourselves to freedom of religion, assembly, speech and the press. Let us consider only those cases in which the highest Court of a state held against a defendant on his plea of immunity by reason of freedom of religion or the press and the Supreme Court of the United States held that it had jurisdiction either to affirm or reverse that highest state court:

In Chaplinsky *v.* State of New Hampshire (N. H. 1942, 62 S. Ct. 766, 315 U. S. 568, 86 L. Ed. 1031, affirming States *v.* Chaplinsky, 18 A. 2d 754, 91 S. H. 310), the sole question was whether cursing an officer was the exercise of religious worship.

In Jobin *v.* State of Arizona, 1942, 62 S. Ct. 1231, 316 U. S. 584, 86 L. Ed. 1691, affirming State *v.* Jobin, 118 P. 2d 97, the Arizona Supreme Court was upheld, but that merely proves our point that the U. S. Supreme Court took jurisdiction to affirm or revetse a religious question.

In Prince *v.* Commonwealth of Mass., Mass. 1944, 64 S. Ct. 438, 321 U. S. 158, 88 L. Ed. —, rehearing denied, 64 S. Ct. 784, 88 L. Ed. — the Supreme Court likewise considered a religious question.

In Jamison *v.* State of Texas, Tex. 1943, 63 S. Ct. 669, 318 U. S. 413, 87 L. Ed. 869, the Supreme Court of the United States considered a State Court decision on the distribution of religious handbills.

In Thornhill *v.* State of Alabama, Ala. 1940, 60 S. Ct. 736, 310 U. S. 88, 84 L. Ed. 1093, reversing 189 So. 913, 28 Ala. App. 527, the highest Court of Alabama was reversed on a question of this kind.

The Supreme Court of the United States in Jones *v.* City of Opelika, 1942, 62 S. Ct. 1231, 316 U. S. 584, 86 L. Ed. 1691, affirming 7 So. 2nd 503, held that this section of the fourteenth amendment prohibited states from denying citizens the rights of freedom of press, speech and worship. We might cite many cases where the Supreme Court of the United States has either affirmed or reversed State Courts in which city ordinances concerning religion or free speech were involved. (For instance: Bowden *v.* City of Ft. Smith, Ark., 1942, 62 S. Ct. 1231, 316 U. S. 584, 86, L. Ed. 1691, affirming 151 S. W. 2d 1000, 202 Ark., 614, and Lovell *v.* City of Griffin, Ga., 1938, 58 S. Ct. 666, 303 U. S. 444 82 L. Ed. 949, reversing 191 S. E. 152, 55 Ga. App. 609); but we have confined ourselves to cases where the State as here was a party, and its highest Court reversed or affirmed.

The Supreme Court of Utah itself has recently stated that "It is now well settled that the freedoms of the First Amendment are among the fundamental personal rights, protected by the Fourteenth Amendment" (citing many cases, such as *Murdock* v. *Pennsylvania*, 319 U. S. 103, 63 S. Ct. 870, 87 L. Ed. 1292, 146 A. L. R. 81; *Cantwell* v. *Connecticut*, 310 U. S. 296, 60 S. Ct. 900). "The decisions of the United States Supreme Court as to whether a congressional act similar to that here considered contravenes the First Amendment is therefore authoritative." *State* v. *Barlow*, Utah, 1944, 153 P. 2d 647.

From the cases cited by the Supreme Court of Utah in that decision we see clearly that it recognizes that the Supreme Court of the United States could reverse or affirm it on the question of whether the *advocacy* of polygamy is immune from prosecution by reason of the religious and press freedoms guaranteed by the First and Fourteenth Amendments, and whether such advocacy is contrary to public morals.

So often has the Supreme Court of the United States granted certiorari and exercised jurisdiction over state Courts in matters of freedom of religion, speech, press and assembly, that we cite but a few additional:

Bridges v. *State of Cal.* (1941), 62 S. Ct. 190, 314 U. S. 252.

Lovell v. *City of Griffin* (1938), 58 S. Ct. 666, 303 U. S. 444.

Jones v *City of Opelika*, 62 S. Ct. 630, 315 U. S. 782.

Bowden v. *City of Fort Smith* (1942), 62 S. Ct. 1231, 316 U. S. 584.

Follett v. *Town of McCormick* (1944), 64 S. Ct. 717, 321 U. S. 573.

Thomas v. *Collins* (1945), 65 S. Ct. 315, 323 U. S. 516.

Taylor v. *State of Mississippi* (1943), 63 S. Ct. 1200, 319 U. S. 583.

West Virginia State Board of Education v. *Barnette* (1943), 63 S. Ct. 1178, 319 U. S. 624, 147 A. L. R. 674.

Jamison v. *State of Texas* (1943), 63 S. Ct. 669, 318 U. S. 413.

Barnette v. *West Virginia S. B.*, 47 F. Supp. 251.

Jonge v. *State of Oregon* (1937), 57 S. Ct. 255, 299 U. S. 353.

Cantwell v. *State of Conn.* (1940), 60 S. Ct. 900, 310 U. S. 296.

Minersville School v. *Gobitis* (1940), 60 S. Ct. 1010, 310 U. S. 586.

No one therefore can well deny the jurisdiction of the Supreme Court of the United States in a case of this kind. All citizens of the United States speak, and most of them read, speak and assemble. Local prejudices often rise high—in this case, for instance, it was necessary to examine two hundred people to get a jury! With radios, newspapers, magazines reaching all states simultaneously, it is

not only the jurisdictional right but also the duty of the Supreme Court of the United States to make its final decisions on the now famous freedoms that distinguish our government from any others of the world. We certainly cannot tolerate a condition wherein a person may say certain things in one state and not in another, or, as here, in a federal jurisdiction but not a state; yet that will be exactly the situation if the Supreme Court of the United States decline to exercise its obvious jurisdiction herein. The decision of the Supreme Court of Utah leaves undecided the continued publication of the sacred Mormon Book, The Doctrine & Covenants—a matter in which an entire Church is interested.

A fatal defect in the opinion of the Supreme Court of Utah is its failure to comprehend the law of freedoms of speech, press, religion and assembly under the First and Fourteenth Amendments to the Constitution of the United States. That law, as we understand it is this:

(a) The exercise of freedom of press, speech, religion or assembly cannot be even questioned unless the expression thereof result in some grave or present danger of major public significance.

(b) The presumption against such major public danger always exists in favor of one merely speaking, writing, worshipping or assembling; and the burden is on the prosecution to overcome that presumption. In spite of the almost constant appeal of the defendants to the courts for protection under the First and Fourteenth Amendments the prosecution missed this point entirely and smugly thought freedom of speech had been sufficiently denied by proving (a) that a husband and others tried to convert his wife and (b) several people had bought a church house,—the overt acts alleged. It is a *reductio ad absurdum* to say that such is of grave public danger.

So the opinion of the Supreme Court of the State of Utah goes beyond all reason in its abstract generalization. The grave public danger recognized was a quarrel between a husband and his wife and the purchase of a house of worship!

To illustrate: at a Thanksgiving table a man states that he believes the Doctrine and Covenants of the Church of Jesus Christ of Latterday Saints, and its 132nd Section concerning a plurality of wives as essential to exaltation in the celestial kingdom of God, and that hereafter whenever he bears his testimony concerning the truthfulness of the Gospel as revealed to the Prophet Joseph Smith he is going to say that he believes that principle should be practiced now. Two neighbors at the same table agree with him. The next week the first speaker is confronted by a woman to whom he bears his testimony to that effect.

Now who cares about the idle chatter of those four people; yet under the Utah opinion the three have committed a crime. Disastrous results must be proved to assail the rights of speech, press, religion and assembly; but the Utah Supreme Court seems content without any results at all. In this it cannot be allowed to stand lest the citizens of a state of the Union be denied the lawful exercise of their freedoms under the Bill of Rights.

The Law of Jaw

Upon what do we base this law of jaw, this law of freedom of speech? Let us examine the matter.

Schenck v. *United States* 249 U. S. 47, 37 S. Ct. 247.

The Defendant, with others, was charged with conspiracy to obstruct recruiting and drafting at the time of the first World War, by circulating certain literature designed for that purpose, all contrary to statute. The defense was the First Amendment. The Court sustained the conviction on

appeal, but announced the following rule (the opinion was written by Justice Holmes):

> ". . . The question in every case is whether the words used are used in such circumstances and are of *such a nature as to create a clear and present danger that they will bring about the substantive evils that that Congress has a right to prevent.*"

Concerning this in his letter to Sir Fredrick Pollock (2 Holmes-Pollock Letters p. 7) Justice Holmes said:

> "There was a lot of jaw about free speech, which I dealt with somewhat summarily in an earlier case—Schenck *v.* U. S.—also Frohwerk *v.* U. S. (249 U. S. 204). As it happens I should go farther probably than the majority in favor of it."

A later case, 268 U. S. 652, 45 S. Ct. 625, repudiated this rule, but Justices Holmes and Brandeis vigorously dissented, applying the "present danger" rule. However, later cases, coming down to the present time have adopted and extended the "clear and present danger" rule as will be noted in the following cases.

United States v. *Korner*, 26 Fed. Sup. 242 (1944).

The action was to revoke the citizenship of the Defendant who had not disclosed that prior to his becoming a citizen he had been a member of the Bund. At page 248 of the opinion, the Court said:

> "Advocacy of ideas or action however reprehensible, is not a justification for denying free speech where the advocacy falls short of incitement, or where there is no exhortation to immediate violence or to crime or other unlawful means, and there is nothing to indicate that the advocacy must be immediately acted on. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected, or was advocated, or that the

past conduct furnished reason to believe that such advocacy was then contemplated. . . .

"Freedom of thought, speech and assembly is the rule; abridgement of that freedom is the exception."

Taylor v. *State of Mississippi*, 63 S. Ct. 1200, 319 U. S. 583.

This was an action to determine the validity of a state statute providing against preaching, teaching or advocating disloyalty to the government of the United States or the State, and against actions reasonably tending to create an attitude of refusal to salute and honor the flag. Other acts were also prohibited.

The conviction of the defendant was reversed. Among other things, the Court relied upon the "clear and present danger" rule.

West Virginia State Board of Education v. *Barnette*, 319 U. S. 624, 63 S. Ct. 1178.

Action to determine the validity of State Board of Education rule, in accordance with state law, requiring flag-saluting exercise in school which was mandatory. Certain children, for religious reasons, refused to participate, were expelled and denied re-admission, their parents thereupon being prosecuted.

The Court said:

"The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. *But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.*"

Thomas v. *Collins, Sheriff*, 65 S. Ct. 323 U. S. 516.

An action to determine the validity of a statute requiring labor organizers to register with the state prior to soliciting union memberships. The State urged it was attempting to protect the laboring class from unauthorized solicitations. The Court held it in violation of the First Amendment, saying:

> "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. . . . (Cases are cited.) That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. . . . (Cases cited.)
>
> "*For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger.* The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. *Accordingly, whatever occasion would restrain orderly discussion or persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.* It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly."

Thornhill v. *Alabama*, 310 U. S. 88, based upon a statute preventing picketing, was decided by applying the "clear

and present danger" rule. The statute was broad in its scope, and included practically every kind of peaceable picketing, and the Court held the statute unconstitutional by the "clear and present danger" test.

Bridges v. *California*, 314 U. S. 252

This was an action to determine the validity of the conviction for contempt of Court, for publication of editorials commenting on a trial and the prospects of sentence and probation, after verdict but before the passing of sentence or the hearing of arguments for a new trial; also for the sending of a telegram by Bridges to the Secretary of Labor, which was also published in the newspapers, criticizing the Court, while a motion for a new trial was pending.

The Court, in its opinion, made an extensive review of the cases involving the "clear and present danger" rule, saying (page 261):

> ". . . In Schenck *v.* United States, however, this Court said that there must be a determination of whether or not 'the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about substantive evils.' We recognize that this statement, however helpful, does not comprehend the whole problem. As Mr. Justice Brandeis said in his concurring opinion in Whitney *v.* California, 274 U. S. 357, 374: 'This Court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present.'
>
> "Nevertheless, the 'clear and present danger' language of the Schenck case has afforded practical guidance in a great variety of cases in which the scope of constitutional protections of freedom of expression was in issue. It has been utilized by either a majority or minority of this Court in pas ing upon the constitutionality of convictions under espionage acts,

Schenck *v.* United States, supra; Abrams *v.* United States, 250 U. S. 616; under a criminal syndicalism act, Whitney *v.* California, supra; under an 'anti-insurrection' act, Herndon *v.* Lowry, supra; and for breach of the peace at common law, Cantwell *v.* Connecticut, supra. And very recently we have also suggested that 'clear and present danger' is an appropriate guide in determining the constitutionality of restrictions upon expression where the substantive evil sought to be prevented by the restriction is 'destructive of life or property, or invasion of the right of privacy'. Thornhill *v.* Alabama, 310 U. S. 88, 105.

"Moreover, the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantial', Brandeis, J., concurring in Whitney *v.* California, supra, 374; it must be 'serious'. id. 376. *And even the expression of 'legislative preferences or beliefs' cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant curtailment of liberty of expression.* Schneider v. State, 308 U. S. 147, 161.

"What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

Herndon v. *Lowry*, 301 U. S. 242, 57 S. Ct. 732.

In applying the "clear and present danger" test, the Court said:

> *"The power of a State to abridge freedom of speech* and of *assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government."*

How the Federal Questions Were Raised

The petitioners and appellants brought to the attention of the lower Courts their rights under the Constitution of the United States, especially under Amendments 1 and 14, as follows:

1. On May 5, 1944, they filed before the District Court of Salt Lake County, Utah, their motion to quash on the ground that the information did not charge a public offense. Motion denied by the District Court of Salt Lake County, Utah, September 5, 1944.

2. On October 2, 1944, the defendants filed their motion to dismiss the action as to themselves individually and jointly on the ground that it "violated the laws of the United States of America: the provisions of the first, fourth, fifteenth, twenty-fourth, and twenty-seventh Sections of Article 1 of the Constitution of Utah; Article three of the Constitution of Utah; the first and fourteenth Amendments to the Constitution of the United States; the files and records herein." Denied by the trial Court October 2, 1944.

3. Defendants' Instructions refused: No. V, instructing that the decision of Hon. J. Foster Symes, Judge (*U. S.* v. *Barlow*, 56 F. Supp.; 65 S. Ct. 25) was *res adjudicata*. No. 24, disregarding the fundamental rights of the defendants under the first Amendment to the Federal Constitution. No. 36, denying the defendants their rights under the 1st,

6th, 8th, and 14th Amendments to the Constitution of the United States. No. 42, defendants' insistence upon their fundamental rights under Amendments 1 and 14 of the Federal Constitution.

4. In their assignments of error before the Supreme Court of Utah, set forth in their brief, the defendants claimed their rights under the 1st and 14th Amendments: No. 27, for the Court's denial of the defendants' right to ascertain the religious prejudice of jurors; No. 28, against the trial's court designating advocating polygamy as a crime; No. 30, for the Court's refusal to disqualify jurors with fixed opinions which would require evidence to change; also in assignments Nos. 9, 10, 11, 14, 15, 18, 21, 34, 35, 98, 113, 121, 137, 138, 140, 150, 151, 179.

5. In their motions for a New Trial, filed October 11, 1944, the defendants alleged that their rights under "the Constitution of the United States" had been disregarded.

All of the foregoing motions, objections and assignments were denied, by the Courts, as clearly appears by the prevailing opinion of the Supreme Court of Utah affirming the decisions below.

The Question Involved Is Substantial

Mormon religious books, asserting as a commandment of God, that a plurality of wives is essential to the highest glory in the celestial kingdom of God, have been published in Utah for a hundred years; the Doctrine and Covenants, which the Supreme Court of the United States has already noticed in allied cases herein, is constantly sold and distributed throughout the world, a million people being sincere believers in it. The defendants here have merely asserted that the Doctrine and Covenants contains commandments of God that are changeless; and that the way to heaven is the same as it was sixty years ago. People

of the Mormon faith are especially numerous in Utah, Idaho, Arizona, Wyoming, Oregon and California; indeed, they are of major importance in California, where one of their members has been Governor and another, we understand, is even now Lieutenant Governor.

This decision directly attacks the right of all Mormons to quote their Doctrine and Covenants and say that they believe it has present application and should be practiced. It should be borne in mind, that probably not one out of a thousand so reading and advocating would think of breaking the law; they realize that anyone who does *practice* the belief will be punished; but somehow they cannot shake off the commandment of their God and their faith, that the legitimate practice of the commandment will be restored. In other words, it is utterly silly to maintain that a commandment of God is valid or invalid, true or false, in accordance with the geographical location of the believer. These people should be allowed to believe as intensely as they desire and to advocate their belief; for if we condemn one church today another may receive our denouncement tomorrow; and thus scattered to the winds will be our vaunted claim of freedom of religion. Denounce this *expression* of belief and we potentially denounce *all* expressions of belief that do not for the moment harmonize with our own philosophy.

The writer often wonders if it would be *contra bonos mores* to express utter contempt for all religions and their pretended divine affiliation; nevertheless if people believe let them believe as they desire. Who are we to judge such things? And what religion is free from censure? However, the Supreme Court of the United States must exercise its constant jurisdiction to preserve these rights.

The Appeal Is Timely Taken

The decision of the Supreme Court of the State of Utah, affirming that of the Court below, was rendered on December 16, 1946; and a petition for rehearing was denied on the 18th day of February, 1947. A petition for appeal, accompanied by assignment of errors and statement of the appellate jurisdiction required by Rule 12 (paragraph 1) of the Supreme Court of the United States was on the 19th day of February, 1947, presented to Hon. Roger I. McDonough, Chief Justice of the Supreme Court of the State of Utah, and by him allowed on the day of presentation.

Finality of Judgment

The judgment forming the basis of this appeal is a final judgment by the highest Court of the State of Utah affirming a judgment of a lower Court. The judgment became final upon the denial of a petition for rehearing thereof.

WHEREFORE it is respectfully submitted, that the appeal of the above entitled cause comes within the proper jurisdiction of the Supreme Court of the United States.

Dated this 19th day of February, 1947.

CLAUDE T. BARNES,
Counsel for Appellants.

APPENDIX

IN THE SUPREME COURT OF THE STATE OF UTAH

No. 6816

THE STATE OF UTAH, *Plaintiff and Respondent*,

v.

JOSEPH WHITE MUSSER, JOHN YATES BARLOW, LOUIS ALBA KELSCH, HEBER KIMBALL CLEVELAND, CHARLES FREDERICK ZITTING, DR. RULAND CLARK ALLRED, ALBERT EDMUND BARLOW, DUANE MARVELL GEE, RULAND TIMPSON JEFFS, GEORGE HEMICKE KALMAR, ROSS WESLEY LEBARON, GUY H. MUSSER, ROBERT LESLIE SHREWSBURY, HEBER CHASE SMITH, JR., ALMA ADELBERT TIMPSON, ZOLA CHATWIN CLEVELAND, MARIE BETH BARLOW CLEVELAND, RHEA ALLRED KUNZ, MYRTLE LLOYD, RUTH BARLOW, MELBA FINLAYSON, MABLE FINLAYSON, MARY MILIS, LEONA JEFFS, JUANITA BARLOW, JEAN BARLOW DARGER, JOHN (HANS) GERHARDT BUTCHEREIT, JONATHAN MARION HAMMON, IANTHIUS WINFORD BARLOW, JOSEPH LYMAN JESSUP, DAVID BRIGHAM DARGER, MORRIS QUINCY KUNZ, EDMUND F. BARLOW, OSWALD BRAINICH, *Defendants and Appellants*.

McDONOUGH, *Justice:*

By information 33 persons were accused by criminal conspiracy to commit acts injurious to public morals in violation of Sec. 103-11-1 (5), U. C. A. 1943. The information in substance charges that between June 1, 1935, and March 1, 1944, in Salt Lake County, State of Utah, the defendants wilfully and unlawfully agreed, combined conspired and confederated among themselves and with other persons unknown to the district attorney,

> "to advocate, promote, encourage, urge, teach, counsel, advise *and* practice polygamous or plural marriages and to advocate, promote, encourage, urge, counsel, advise *and* practice the cohabiting of one male person with more than one woman and in furtherance

and pursuance of said conspiracy and to effect the object thereof, did commit the following acts:"

(1) That from June 1, 1935, to March 1, 1944, in Salt Lake County, State of Utah, defendants published and distributed once each month, a pamphlet called "Truth"; (2) that on July 1, 1942, defendants purchased a house at 2157 Lincoln Street in Salt Lake City; and (3) that in 1942 and 1943 in Salt Lake County the defendants attempted to convert Helen Smith to believe in and to live in polygamy. Other overt acts alleged, were not submitted to the jury for consideration.

Defendants moved to quash the information on two grounds only: (a) That it does not charge the commission of any public offense; and (b) that it states matters amounting to legal justification. Independent of any interpretation by counsel, the information suggests that defendants as a group agreed to practice polygamy, a felony. Since an agreement between one man and a plural number of women to practice polygamy, followed by the overt act of polygamous marriage of the persons so agreeing, would constitute the substantive offense of polygamy by the man, a serious question might arise as to whether such an agreement would charge conspiracy. Defendants did not move to quash on the ground that the information is ambiguous, uncertain, or that it charged more than one offense.

If "the" appeared in lieu of "and" in the two places italicized, and "of" appeared after the word "practice" in each instance, the information would read the way the State apparently construes it. From the argument of defendants in assailing the information for failure to state a public offense, it would appear that in spite of the awkward and ambiguous sentence structure appellants have apparently adopted the construction urged by the State, that the information attempts to charge a conspiracy to commit acts injurious to public morals, by an agreement entered into between defendants to advocate, teach, counsel, advise, encourage and urge other persons to engage in the practice of polygamy and the cohabitation of a man with more than one woman.

Since the alleged conspiracy relates to acts injurious to public morals the primary question to be determined in testing the sufficiency of the information is, Does the advocacy of the practice of polygamy and the urging of other people to engage in such practices within the State of Utah, constitute *acts* injurious to public morals within the meaning of the conspiracy statute? At the oral argument counsel for appellants contended that *advocating* the practice of polygamy is merely the expression of an opinion or belief; that such teachings do not constitute *acts;* that such advocacy consequently could not constitute acts injurious to public morals; and that such expressions of opinion and belief are immune from prosecution under the constitutional guarantees of religious liberty and freedom of speech, and could not properly be the subject of criminal conspiracy. They further contend that in a recent case in the United States district court involving a number of the defendants in this case, (United States *v.* Barlow, et al., 56 F. Supp. 795), it was held that advocating the practice of polygamy as a religious belief, does not tend to deprave public morals. They also claim that by reason of the fact that the appeal by the government was dismissed by order of the United States Supreme Court, (323 U. S. 805, 65 S. Ct. 25), such decision on such a question became final and conclusive, and is binding on the courts of this state.

In that case some of the defendants here were indicted for conspiracy to violate 18 U. S. C. A. Sec. 334 as amended, which forbids mailing of "obscene, lewd, or lascivious" books, pamphlets, pictures, "or other publication of an indecent character." The defendants were alleged to have published and circulated "Truth" magazine, the publication and distribution of which are charged as overt acts in this case. U. S. *v.* Barlow, supra, was dismissed, because in the opinion of the Federal judge the excerpts from said magazine charged in the indictment as nonmailable matters under the Federal statute, were not calculated to "corrupt and debauch the minds and morals" of those into whose hands such publications might come. The opinion relates to the interpretation of the Federal

statute, and states that the indictment does not charge an offense against the United States. The opinion does state that editorials in such magazines advocate the practice of polygamy, but while stating that such publication is not subject to prosecution under federal statutes, the language recognizes that the act in question might well be subject to prosecution under the laws of Utah:

> "The constitution of Utah prohibits polygamous or plural marriages. It might well be said that any prosecution for violations thereof under our theory of government is a purely local matter for the State rather than the Federal Government, in the absence of a widespread violation of the law."

Absent any constitutional limitation on the power of a state to legislate an adjudication by a Federal court that a specified act does not contravene a Federal statute does not even warrant an inference that such conduct would not violate a state statute. Appellants' contention to the contrary is without merit.

Article III of our State constitution prohibits plural or polygamous marriages. Statutes enacted pursuant thereto, Secs. 103-51-1 and 2, U. C. A. 1943, make felonious both the practice of polygamy and cohabitation of a man with more than one woman. Such relations are regarded by the law as meretricious. Conduct which induces people to enter into such felonious meretricious relationships, is certainly conduct injurious to public morals. Defendants, however, contend that if a conspiracy could be charged for expression of beliefs and ideas, then every effort to change some obnoxious law or some objectional constitutional provision could be thwarted by a conspiracy charge. There is a vast distinction between advocating a change in the law by appropriate legislation, and urging people to commit acts in violation of the law. Advocating violation of law is not an equivalent of urging repeal of the law.

Admittedly, a person cannot properly be prosecuted for expressing opinions nor for mere beliefs and personal convictions, however peculiar or repugnant they might seem to others. However, conduct condemned by statute may not

"be made a religious rite and by the zeal of the practitioners swept into the First (or Fourteenth) Amendment." Murdock *v.* Pennsylvania, 319 U. S. 105, 63 S. Ct. 870, 87 L. Ed. 1292. State *v.* Barlow, et al., 107 Utah 292, 153 P. 2d 647.

Statutes do not attempt to regulate beliefs, but conduct. Freedom of speech and of religion are not unlimited licenses to do unlawful acts under the label of constitutional privilege. Expressions and the use of words may constitute verbal acts. Words may ignite an inferno of mob violence. As stated by Mr. Justice Holmes in Schenck *v.* United States, 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 470: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force." See also Gitlow *v.* New York, 268 U. S. 652, 45 S. Ct. 625, 69 L. Ed. 1138, wherein the court said: "That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question." In Davis *v.* Beason, 133 U. S. 333, 33 L. Ed. 673, 10 S. Ct. 299, wherein petitioners had been convicted of a conspiracy to obstruct the due administration of the laws of Idaho, the Supreme Court in upholding the judgment said: "Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. . . . If they are crimes, then to teach, advise and counsel their practice is to aid in their commission, and such teaching and counseling are themselves criminal and proper subjects of punishment, as aiding and abetting crime are in all other cases."

We therefore hold that an agreement to advocate, teach, counsel, advise and urge other persons to practice polygamy and unlawful cohabitation, is an agreement to commit *acts* injurious to public morals within the scope of the conspiracy statute.

Other than agreements to commit certain felonies which require no overt acts, an unlawful agreement as defined in

Sec. 103-11-1, U. C. A. 1943, does not amount to a conspiracy according to the specifications of Sec. 103-11-3, "unless some act, besides such agreement, is done to effect the object thereof by one or more of the parties to the agreement." Thus, a criminal conspiracy essentially consists of an unlawful agreement plus some overt act or acts done to further or to accomplish the object of such an agreement. Defense counsel claim that the information does not show that any alleged overt act was either unlawful or effective. An act done in furtherance of an agreement need not succeed in accomplishing its objective in order to fulfill the requirements of the statute. Thus, the failure to allege that the attempts to convert Helen Smith to believe in and to live in polygamy were successful, would not render the information deficient.

Appellants urge that the right to purchase property is a constitutional privilege, whether for purpose of having a place of worship, a home, for social gatherings or other uses in the pursuit of happiness, and that such purchase could not be an overt act. The argument seems to miss the point. An act need not be unlawful to be an overt act. It must necessarily be an act which is done in furtherance of the object of the unlawful agreement. State *v.* Erwin, et al., 101 Utah 365, 120 P. 2d 285. The purchase of a gun ordinarily is a lawful act; yet, if there is an agreement to commit murder (which is a criminal conspiracy without any overt act), the purchase of a gun by one of the conspirators for the purpose of carrying out the homicidal agreement would be an overt act. The procurement of any tool, device or instrumentality by one who has entered into the unlawful agreement, which constitutes a step toward the accomplishment of the object of the agreement, is an overt act. There must, of course, be proof that the overt act as alleged was done in furtherance of the unlawful agreement. The information however, need not allege the circumstances which show connection with the unlawful scheme and that such an act was done in furtherance of the unlawful agreement. Such details may be supplied by a bill of particulars.

The three alleged overt acts stated in the information which the court permitted to remain when the case was

submitted to the jury, are sufficient statements of overt acts to uphold the information. Whether there was sufficient proof to show that such acts were actually done by the persons alleged and done in furtherance of the alleged unlawful scheme is another question presently to be considered.

While defendants assign as error the refusal of the court to order the district attorney to furnish a bill of particulars, such assignment of error is not argued, and hence must be deemed to have been abandoned. There are numerous other assignments of error relating to admission and exclusion of evidence wherein appellants complain that the court erred, without specifying wherein error occurred and without arguing such alleged errors. Of the 186 alleged errors specified, we shall consider those only which are properly specified and which are argued. Those not argued are deemed to have been waived.

Appellants challenge the verdict on the ground that the evidence was insufficient to support a conviction of the defendants as a whole or any of the defendants. They claim error in failure of the court to give their request for directed verdict as to each defendant. It is contended that the State failed to prove that the defendants entered into the agreement alleged. They also argue that there was not sufficient competent proof to show that each defendant was a party to an unlawful agreement, and that no overt act was satisfactorily proved.

The State had the burden of proving that there was actually a conspiracy, that there was a meeting of the minds between the defendants on the unlawful scheme alleged, and that one or more of such defendants so agreeing committed some overt act or acts in furtherance of the object of such unlawful agreement. The rule of presumption of innocence applies to each individual defendant. The fact that a defendant may be charged as a co-conspirator does not deprive him of any of those safeguards called due process of law, which necessitate that evidence produced against him shall be competent, relevant and material.

An alleged unlawful agreement may be proved by circumstantial evidence insofar as the evidence is competent; but until a defendant is proved by competent evidence to have entered into or to have joined in the alleged unlawful agreement, extrajudicial statements and admissions of co-defendants which tend to implicate him as a party to the agreement or in some overt act, are hearsay and inadmissible as to him. However, when a defendant is shown by competent proof to be a party then all other persons proved to be parties are his agents for purposes of the unlawful agreement so that acts of such other parties relating to the unlawful agreement or overt acts in furtherance of the agreement are binding upon him under the rules of agency. State *v.* Erwin, supra. Until a defendant is proved to be a principal, other defendants shown to be parties would not be his agents, and statements made out of his presence would not be binding upon him regardless of how they might tend to implicate him.

Likewise, where proof of an unlawful agreement is furnished by an accomplice, there must be sufficient corroborative evidence to identify each defendant as a party to the unlawful scheme. If, as to any particular defendant, there is lacking corroborative evidence of that given by an accomplice, the verdict against him cannot stand. Since the transcript shows that evidence introduced to prove that certain defendants were parties to the unlawful agreement or that they later joined in such agreement, was but hearsay, the verdict as to those particular defendants cannot be upheld. As to some defendants identified as parties to the scheme by the testimony of an accomplice, there was no corroboration by competent evidence, and the verdict as to those defendants likewise must be set aside.

There is some evidence which, standing alone, is just as consistent with innocent conduct as with any theory of unlawful conduct, as such cannot satisfy the requirements of proof. For example, testimony that a certain defendant was seen engaging in conversation with a defendant shown to be a party to the unlawful agreement, without disclosure as to what was said, neither proves that such defendant entered into an agreement nor that if an agree-

ment of some kind was made that it was the unlawful agreement alleged. There were also numerous statements of State's witnesses that a certain defendant "discussed polygamy" without detailing what was said about it. Such generalities have no probative force. The testimony that a defendant "discussed the subject of plural marriage" is not the basis for the slightest inference that anything charged by the State ever occurred. If the witness had testified that a defendant "discussed the subject of crime", no inference could be drawn that he urged someone to commit a crime, nor that he solicited someone to enter into an agreement to commit crime.

There was considerable testimony that some defendants attended meetings at which the subject of polygamy was discussed; that at such meetings some speakers made statements that they had a right to practice polygamy; that the law could not stop them; and that it was the duty of the women to go out and get other wives for their husbands. Mere attendance at meetings is not evidence that the members of the audience entered into any agreement, nor could it imply that the listeners were responsible for what was said at such meetings. The complement of freedom of speech is the right to listen to a speaker's views. Even if a speaker urges violation of the law, no inference can be drawn from such fact alone that members of the audience entered into an agreement to confederate with such speaker to carry out the design or scheme of such speaker. While coupled with other facts and circumstances, attendance at a meeting where persons proved to be conspirators address a meeting, might forge a chain of circumstantial evidence of an agreement with such conspirators; yet, standing alone, such passive attendance at such meetings would not have sufficient probative value to warrant an inference of unlawful conduct.

Appellants argue that the evidence as a whole merely shows that defendants met for religious purposes; that they conducted worship, expressed *beliefs* concerning the hereafter; that any person in the congregation was permitted to express his views; and that such meetings and discussions held openly and without barring the general

public, were all in the exercise of the constitutional rights of freedom of worship and freedom of speech. Since a conspiracy must necessarily involve some agreement to do something which the parties do not have a right to do, they contend that defendants did only what they had a constitutional right to do, and that consequently no conspiracy could be spelled out from such events.

It is true that *some* evidence introduced by the State would merely show that certain defendants attended such meetings; that some meetings were conducted as religious services; that speakers and class-leaders read from the Bible and other religious works; that tithing was collected, and in part used for relief of persons in economic distress; that at some services topics were discussed such as brotherly love, faith in God, repentance, baptism, patriotism, honesty and rewards after death; that at certain meetings speakers discussed polygamy, reading from the Bible and making the claim that the ancient polygamous marriage system was instituted of God, and that "plural marriage is a law of God," and that some individuals at these meetings declared that legislation prohibiting the practice of polygamy violates the spirit of the First Amendment to the Federal Constitution; that some speakers denounced officials of the Mormon Church for excommunication of people for teaching or practicing plural marriage, stating that the leaders of said church have "no divine authority" and that such church is apostate; and that some services were conducted as "testimonial meetings" at which members of the congregation arose voluntarily to express their views on any subject, and to acknowledge gratitude to God. Counsel for appellants say that this prosecution is nothing more than persecution of appellants for expression of unorthodox views and for membership in an unpopular minority group.

If it were true that none of the defendants did anything other than to attend meetings as indicated above, expressing disagreement with some other denomination, criticizing legislation, and giving opinions on religious subjects, none of the convictions could be upheld. The right of free speech cannot be curtailed by indirection through a charge

of criminal conspiracy. However, an examination of the entire record discloses that the foregoing statement of evidence does not present the entire picture as to some of the defendants.

We have reviewed the record carefully and conclude that the evidence is sufficient to show an agreement to advocate, counsel, advise and urge the practice of polygamy and unlawful cohabitation by other persons; and that the following named defendants were parties to such unlawful agreement: Joseph White Musser, Guy W. Musser, Charles Frederick Zitting, Heber Kimball Cleveland, Zola Chatwin Cleveland, Jonathan M. Hammon, Ross Wesley LeBaron, John Y. Barlow, Albert Edmund Barlow, Edmund Francis Barlow, Ianthius Barlow, Juanita Barlow, Louis A. Kelsch, Dr. Rulon Clark Allred, David B. Darger, Jean Barlow Darger, Rulon T. Jeffs, George H. Kalmar, Joseph Lyman Jessup, and Alma A. Timpson.

As to the other defendants, there is not, in our opinion, sufficient competent proof, to show that they were parties to the agreement. In some instances, as to defendants against whom the proof is insufficient, there were admissions that they themselves had entered into polygamous relationships; but standing alone, such admissions do not constitute proof that they had entered into an agreement to induce third parties to enter into such practice. Some of the women defendants stated in testimonial meetings that they were "happy with their sister wives" and that they helped each other with the housework. Such statements, standing alone, would not be proof of any unlawful agreement to urge others to practice polygamy. Some statements of some defendants would tend to show that said defendants were victims, rather than principals.

An admission by a person that he had engaged in the commission of some crime or had aided or abetted it in some way, would not be the equivalent of an admission that he had entered into an agreement with someone else to attempt to get others to commit the same kind of crime. Certain evidence tends to show that some defendants associated and communicated with each other other because they had violated the law by previously entering into un-

lawful practices and that they had sought refuge from prosecution.

There is sufficient competent evidence that the defendants hereinabove specifically named made such statements and did such other acts as to show a meeting of the minds on the unlawful scheme alleged. They used the mechanism of an organization ostensibly and perhaps sincerely designed for religious purposes to commit overt acts in furtherance of their unlawful agreement. Contrary to the arguments of counsel, these particular defendants did not merely express beliefs and limit their remarks to mere academic discussions. It is true that they discussed theological topics at some of their meetings; but they also spoke about polygamy in such a way as to evidence a design to induce others to act and pressure was applied to several people.

Without attempting to detail all of the evidence which shows an agreement such as alleged, we direct attention to certain evidence. Some of the men claimed in public that they had the right to perform polygamous marriages. They proclaimed that polygamy *must* be lived, one defendant saying that the law makes no difference with them. One defendant declared that polygamy should be practiced at present; that public relief "was instituted of the Lord for the polygamy people", and that they should get on relief and stay on relief. One defendant announced that it was the duty of women to find other wives for their husbands. Some also announced in meetings attended by persons not indulging in such practices, that no woman should prevent her husband from taking another wife, and that she should go along with her husband or else step aside so he could take another wife, and that men should have the courage to act. At one of these meetings, one Heber C. Smith, Jr. was made the specific object of remarks of various defendants.

We cite this evidence of acts which tend to prove the agreement itself, which shows a systematized plan to induce others to enter into the practice of polygamy, in which scheme of advocacy a number of these defendants participated. Although, as heretofore stated, it is not

essential to the existence of a conspiracy that the object of such conspiracy be actually accomplished, it would appear from the evidence that the efforts to induce Heber C. Smith, Jr. to practice polygamy were actually successful, and that he and his family were among the victims of this conspiracy. There is some evidence that LeBaron with the aid of his wife, and the arrangements made by Zitting, induced a 13 year old girl to agree to be his polygamous wife. Zitting told her all she would have to do is bear children. While no marriage ceremony was proved, such proof was not necessary. LeBaron stated to the father of this witness that the girl was his wife.

That this agreement contemplated actual inducements and solicitations directed at others is evident from the testimony of a defense witness. She testified that defendant Hammon stated in one of the meetings that if a man is interested in a girl who is under age and he wants the girl, he should go to the father and first obtain his consent. The witness stated that she understood this to relate to polygamy.

What we have said hereinabove disposes of the argument that none of the defendants did anything except engage harmlessly in the expression of religious beliefs. In fact, some of these defendants wilfully broke up the home of Helen Smith by persistently urging and inducing her husband to enter into the practice of polygamy. The solicitations which induced Heber C. Smith, Jr. to enter polygamy, all in opposition to the interests and desires of his wife, Helen Smith, and the consequent broken home from the divorce which followed, are a complete answer to the contention that none of the defendants said or did anything which could be construed to be injurious to public morals. The claim that everything was on a voluntary basis and that the wishes of others were respected, is unconvincing in view of the unrefuted evidence to the contrary. The contention that all the defendants confined their activities to expressions of beliefs without interfering with the rights of others, and without attempting to induce others to act, is not sustained by the record.

Appellants argue that the alleged overt acts were not proved. It is urged that the publication of "Truth" maga-

zine could not be an overt act in view of the constitutional guarantee of freedom of the press, since only a few editorials could be construed as advocating the practice of polygamy. It is true that the state relied on a few excerpts from said magazine which was published over a period of nine years. A question might arise ordinarily as to whether the publication of a periodical involving numerous issues and extending over a period of years could be considered as one all-embracing overt act. This publication started in 1935. In order to have been an overt act, the unlawful agreement must have previously come into being, for an overt act is something done in furtherance of the object of the unlawful agreement. The unlawful agreement in this case appears to have been entered into after "Truth" magazine had been published for several years. As to those issues, they could not constitute any overt act. Some of the articles appearing in those magazines were reprints of articles advocating the practice of polygamy, published many years before statehood and prior to enactment of legislation by this state prohibiting such practices. In view of other matters, we are not called upon to decide whether reproduction of those articles amounts to a present advocacy of such a practice.

Since the State introduced evidence which would tend to show that the house purchased by two of the defendants was used for religious services and for social gatherings, which were admittedly lawful objects, it is urged that such purchase could not be construed as an overt act. People have the right to purchase property for all lawful purposes. The fact that some defendants entered into an unlawful agreement would not necessarily constitute proof that the purchase was made in furtherance of the unlawful scheme. A purchase may be made for more than one purpose, for both a lawful and for an unlawful purpose. There is some evidence that the building was intended to be used in part at least by some of the defendants to advocate the practice of polygamy and unlawful cohabitation. There is also evidence that the house was used as a place of solicitation and to importune people to enter into polygamous relationships. An act done in furtherance of an

unlawful agreement is an overt act even if there are additional objectives which happen to be lawful. However, where property is acquired for some purpose which is lawful, evidence that it was also acquired in furtherance of an unlawful scheme must be clear and unequivocal. There is evidence of such a character here.

It is contended that the solicitation of Helen Smith to agree to allow her husband to marry some other girl and to induce her to aid in establishing a polygamous relationship did not constitute an overt act because it was obvious that no amount of persuasion could possibly be effective. Such argument disregards the nature of an overt act. The object of the unlawful scheme was advocating and urging others to enter into prohibited relationships. Whether such inducements could succeed would not be material. The systematic solicitation, and urging of others to violate the law, went far beyond mere expressions of opinion contemplated by the guarantee of freedom of speech. Words were employed in conversation with Helen Smith with a design to induce her to consent to the proposed meretricious relationship. Pressure was applied to her husband and to her in the endeavor to overcome her antagonism. It is true, of course, that she would not have committed the crime of polygamy by giving her consent, but if she had yielded to the solicitations of certain defendants she would have been required to share her husband with some other woman or women; and because she refused to submit, her home was broken up by reason of the fact that her husband was induced to take a polygamous wife in spite of her objections and refusals.

Defendants challenged the right of Helen Smith to testify. They claim she was disqualified as a witness because her former husband was named a defendant, although the State severed as to him. Her divorce from Heber C. Smith, Jr. had become final prior to the date of trial so that she was no longer the wife of said Smith. She could not therefore have been testifying against her husband as contended by appellants. See 70 C. J., "Witnesses", p. 125, Sec. 152 and cases cited; and 4 Wigmore on Evidence (2nd Ed.) Sec. 2237 at p. 775.

The remaining question relating to her testimony is whether the court committed prejudicial error by overruling objections to questions as to what Heber C. Smith, Jr. said to her at the time he was still her husband. It is claimed in view of the language of Sec. 104-49-3 (1), U. C. A. 1943, any conversation between them during their marital status was privileged and that she could not divulge it. The statute, exclusive of the exception clause, forbids either husband or wife "during the marriage or afterwards" to be examined as to any communication made by one to the other during the marriage without the consent of the other. In In Re Ford's Estate, 70 Utah 456, 261 P. 15, it is stated that the "communication" between husband and wife contemplated by said statute consists of those communications and knowledge imparted which are confidential in character.

In substance, Helen Smith testified that Smith told her at the time she was still his wife, while they were on their way to one of the meetings with some of the defendants, that he thought that Barlow could convince her that she was wrong in opposing plural marriage. Just prior to their going to the Musser home he told her that he would like to have her hear Musser's views on plural marriage and that she would likely feel differently about it. Such remarks related to subjects which were to be and were discussed with third parties. Consequently, they could not be deemed confidential.

Furthermore, the question presented by the assignment of error was not presented to the court below. The only objection interposed below to the testimony of Helen Smith relative to these conversations with Heber C. Smith, Jr. was that it was incompetent, irrelevant, immaterial and hearsay. No objection based on communications between husband and wife was made. An objection to testimony on the ground of privilege is not properly made when based on the ground that it is incompetent. Proffit *v.* United States, 264 F. 299. Underhill's Criminal Evidence, (4th Ed.) p. 682.

In connection with the argument that the court committed prejudicial error in excluding defense testimony,

we note that counsel for appellants repeatedly asked the following question: "Did anyone at these meetings *urge* people to enter plural marriage?" Objections were repeatedly sustained, although some of the witnesses for the State said in their testimony that certain defendants at these meetings *urged* the practice of polygamy. No harm could have resulted from permitting an answer to the question as worded, although technically the question did call for a conclusion.

Prejudicial error is claimed by reason of certain comments of the trial judge on matters relating to evidence and to defendants. The matter most seriously argued related to contents of a pamphlet exhibited to a witness for the State who was an accomplice. On direct examination she had testified that some of the defendants had discussed polygamy with her and that defendant Cleveland had talked to her and read to her from a certain pamphlet on marriage of which defendant Joseph W. Musser was one of the authors. On cross-examination certain parts of the booklet were read to her and she admitted that they were some of the portions Cleveland had read to her and she indicated that certain other parts sounded familiar. Later, counsel for defendants attempted to introduce the pamphlet in evidence, and since there had been read into the record the portions alleged to have been read to her, the offer was properly refused. However, in ruling on the offer the following colloquy took place:

> "Mr. Patterson: It seems to me this is material for the reason she testified she was taught from this book, and the best evidence of what she was taught
>
> "The Court: This book is not on trial. Cleveland is on trial.
>
> "Mr. Patterson: She stated she was taught from this book.
>
> "The Court: *There are lots of nefarious books written.* I will exclude that."

The italicized expression was improper, notwithstanding it is undoubtedly categorically correct as a statement of fact.

A correct statement of fact may be entirely out of place when made at the improper time or by some person whose duty it is to refrain from making such a remark under the circumstances. A trial judge in a jury trial might be making a correct statement of fact by volunteering that a defendant on trial was tried in his court on some prior occasion and convicted, but the remark would clearly be grounds for a mistrial. The booklet in question here was written by one of the defendants.

The statement without its context and the circumstance which brought it forth would be but an irrelevancy. But when made in response to an argument urging the admissibility of the book *and when followed by* the statement, "I exclude that ", the jury may well have construed it as a characterization of the publication. Portions of the book has been received in evidence. The court's remark, if construed by the jury as indicated, would constitute a comment on the evidence. In this jurisdiction, such comment is not within the province of the court. State *v.* Green, 78 Utah 580, 6 P. 2nd 177. And if so understood by the jury, the remark could not be regarded as nonprejudicial. Characterizing as "nefarious" a publication written by a defendant and used by other defendants in what they contended was propagation of religious views, could not but convey to the minds of the jurors the impression that the court thought that the writer of the book and the propagators of the views therein expressed are iniquitous.

No objection was made nor any exception taken below to this comment. Had there been, and had the implication been called to the court's attention, doubtless the implication would have been erased and any inference therefrom on the part of the jury would have been forefended. Where irregularities are such that a harmful result could not be obviated by any further action, such irregularities may be held ground for reversal, although not excepted to in the trial court. (See People *v.* Mahoney, 258 P. 607.) But since the indicated implication in the statement of the court was probably not intended, that situation did not present itself. Nevertheless, we are constrained to discuss the assignment and to point out its probable prejudicial effect.

Appellants contend that they were denied an impartial jury trial because the judge refused to exclude from the jury panel all members of the Church of Jesus Christ of Latter-day Saints, (for convenience herein called the "Mormon Church"). The judge stated that no one would be excluded from the jury merely by reason of church affiliation. On challenge of some Mormon jurors for alleged bias, on voir dire examination each of them stated that regardless of the emphatic stand of the Mormon Church against the advocacy or practice of polygamy, he would try the case according to the evidence and the court's instruction. The charge of bias was not substantiated.

In the effort to impeach said Mormon members of the jury panel for alleged religious prejudice, defense counsel over objection of the prosecution asked such prospective jurors *if they did not know:* (a) That some of the defendants had been excommunicated from said church for advocating or practicing polygamy; (b) That no one is ever excommunicated without a trial at which evidence is produced, and the member charged with misconduct is given an opportunity to defend; and (c) that judgment of excommunication is based on a finding that the communicant has been guilty of "teaching, preaching or practicing polygamy." Counsel for defendants conveyed to the jurors information that some of the defendants had been found guilty in an ecclesiastical forum of the Mormon Church of either advocating or practicing polygamy. Whatever prejudice might have been engendered by such defense tactics could not serve as a premise on which to predicate reversible error. Nor could such facts brought into the case by defendants themselves show that individual jurors were biased.

Prejudice is claimed by reason of alleged erroneous questions propounded by the court in the interrogation of jurors, and by reason of certain comments made in relation thereto. The court had a rather exacting job as 89 prospective jurors were examined. Rather early in that process a juror stated that he had formed an opinion as to the guilt or innocence of the defendants, and on further examination stated that "it could be changed" as the case went on;

and counsel for defendants subsequently made objection, and in connection with the challenge of a juror for cause, counsel for defendants argued that "if it takes evidence to change that mind he is not eligible. That is the law." To which remark the court responded, "Not in this court, I am sorry to say."

Subsequently, a juror stated that he had formed an opinion as to the merit of the case; that he could not help it, and that his opinion related to the guilt or innocence of defendants. The court then asked: "Is it such an opinion that it would not yield to the facts presented here in the court room before you for your consideration, as a juror?" After objections of counsel the juror answered: "It would take evidence to change my opinion. Does that answer it? I have formed an opinion. I couldn't help it." The court then inquired: "The opinion you now have—could the opinion you now have be removed by the evidence you heard in this court and altered and changed?" He replied: "Yes, sir, by evidence it could." Following considerable argument, the judge said: "Is your opinion (such) . . . . that you could lay it aside and consider this case on the evidence presented here, and the instructions of the court, and finally render a fair and impartial verdict based solely upon the evidence produced here in the court room?" The answer was: "By the evidence, yes sir." The challenge for cause was denied.

A short while later, it appeared that a juror had listened to a discussion of the case. The court asked "Have you got an opinion now that is of such fixity in your mind that it would not yield to the evidence produced here?" A negative answer was given.

None of the veniremen whose examination is here discussed served as jurors. They were excused on peremptory challenge. Appellants, however, contend that they were prejudiced by the denial of their aforesaid challenges for cause in view of the fact that they were required to exercise three of their peremptory challenges which might have been interposed to other veniremen who actually served on the jury. Appellants exercised all of their peremptory challenges.

As noted above, the exception taken to the propounded questions of the court was to the effect that if a juror had an opinion which it would take evidence to remove, then he could not be an impartial juror since he could not accord to the defendants and each of them the presumption of innocence. Standing alone, the questions set out hereinabove might be construed by the jurors addressed, and the others present who heard the questions, to mean that the jurors might carry with them to the jury room the opinion formed prior to trial and, unless that opinion was changed by the evidence, return a verdict in conformance therewith. It should not be necessary to say that this is, of course, not the law.

However, at the outset of the examination of the jury, the court instructed all of the prospective jurors that those chosen to serve must determine the facts in accordance with the evidence produced in court; that their verdict should be based solely upon that and nothing else. He pointed out specifically that each defendant was clothed with the presumption of innocence and that unless that presumption was overcome by evidence produced in court which proved the guilt of the defendants beyond a reasonable doubt, they were entitled to an acquital. In such initial discourse to the jury, the following statement by the court was made:

> "The mere fact that you have read about this case in the newspapers or that you have discussed it with others or heard it discussed by others, or that you have formed or expressed an opinion bases solely upon newspaper accounts of the case or gossip or common notoriety, those things in and of themselves do not disquality you as serving as jurors on the case if you can in spite of that and nevertheless be fair and impartial, put to one side any opinion that you have ever formed based upon the sources that I have indicated"

As to the jurors examined and not excused for cause upon challenge, each had indicated that any opinion that he had formed or expressed was based upon newspaper articles,

common notoriety and gossip and that none of them had any direct information with respect to the facts in the case. Of numerous jurors the question was asked as to whether that juror could lay aside his opinion and consider the case on the evidence presented in court and finally render a fair and impartial verdict based solely upon such evidence. Just prior to the exercise of peremptory challenges, the court again called attention to the presumption of innocence that attended each defendant and asked generally of the panel as to whether there was any one present on the jury who would not be willing to accord each defendant the presumption of innocence until their guilt was proved beyond a reasonable doubt.

In the light of these instructions and comments made by the court subsequent to the answers of jurors in question, we are of the opinion that the jurors could not have been left with the impression that they were qualified to sit as jurors if they entertained an opinion which would require evidence to remove. While the remarks of the court were unfortunate, it appears to us that when the entire picture of events is properly regarded, the effects of the statements complained of were erased from the minds of the jurors. A number of jurors were excused for cause upon challenge, after indicating that they had an opinion relative to the guilt or innocence of the accused which would prevent them from acting impartially in the case.

Section 105-31-21, U. C. A., 1943, provides in part:

". . . but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury founded upon the public rumor, statements in public journals or common notoriety; provided, it appears to the court, upon his declaration under oath or otherwise, that he can and will notwithstanding such opinion act impartially and fairly upon the matters submitted to him."

This provision has been in existence in this state since territorial days and has been construed and applied in numerous cases. See State *v.* Haworth, 24 Utah 398; People *v.* Hopt, 4 Utah 247, 9 P. 407, 120 U. S. 430, 7 S. Ct. 614,

30 L. Ed. 708; Thiede *v.* People, 159 U. S. 510, 40 L. Ed. 237, 16 S. Ct. 62. What we here say should not be construed as in any way departing from the rules therein announced. We are of the opinion that on the whole record, the objections made and exceptions taken, that this assignment of error is not well founded. It is therefore overruled.

In pronouncing sentence, the court announced that the defendants Juanita Barlow and Jean Barlow Darger were under 18 years of age at the time the offense was committed and expressed some doubt as to the jurisdiction of the court to proceed against those two girls. They were not accused of a felony but an indictable misdemeanor. Sec. 14-7-4, U. C. A. 1943, provides in part:

> "The juvenile court shall have exclusive jurisdiction in all cases relating to the neglect, dependency and delinquency of children who are under eighteen years of age, except in felony cases as hereinafter provided, . . ."

Section 14-7-6, U. C. A. 1943, provides:

> "No child under eighteen years shall be charged with or convicted of a crime in any court except as provided herein. If during the pendency of a criminal or quasi criminal charge against any person in any other or quasi criminal charge against any person in any court, except felony cases brought before the district courts, it shall be ascertained that said person was under the age of eighteen years at the time of committing the alleged offense, it shall be the duty of such other court to transfer such case immediately, together with a transcript of the proceedings and all the papers, documents and testimony connected therewith, to the juvenile court having jurisdiction. . . ."

As to those two defendants, the case should have been transferred to the juvenile court. While no assigment of error calls our attention to the error committed in trying and sentencing the two named defendants in the district court we take cognizance of that court's want of juris-

diction. The conviction and sentence of Juanita Barlow and Jean Barlow Darger must be set aside.

As to defendants other than the 20 hereinabove specifically named, the judgment is reversed with directions to dismiss as to them. As to the 20 defendants hereinabove specifically named, there is sufficient evidence to support a judgment of conviction. However, for the reasons hereinabove set out the conviction of Juanita Barlow and Jean Barlow Darger is set aside with instructions to transfer the case as to them to the juvenile court in accordance with the cited statute. The judgment as to the other 18 defendants hereinabove specifically named, against whom the evidence is sufficient, is affirmed.

We concur:

LESTER A. WADE,
Justice.

JAMES H. WOLFE,
Justice.

LARSON, *Chief Justice:*

I concur in that part of the opinion upholding the information and declaring that an agreement to counsel, advise and urged other persons to practice polygamy is an agreement within the scope of the conspiracy statute. I concur in the holding that the evidence is insufficient to sustain a verdict against any defendant other than the twenty held by the prevailing opinion. I agree that as to Juanita Barlow and Jean Barlow Darger the sentence and conviction must be set aside for the reasons stated in the opinion.

Now I note the matters in which I must dissent. I think the questions asked Helen Smith as to what was said to her by her husband relative to Barlow and Musser were in the nature of communications which are confidential under the provisions of Sec. 104-49-3 (1), U. C. A. 1943. However, that does not avail the defendants because: first, no objection was made on the grounds of privileged communication; second, such objection is only available to the other spouse; and third, Heber C. Smith, the husband, is not one of the twenty defendants as to whom we hold there is evidence enough to go to the jury.

I think the opinion is in error on the question involving the competency of certain jurors. To my mind the record compels the conclusion that the trial court was in error in denying the challenge of defendants to such jurors. I fear the effect of the holding of the opinion will be to render any talesman competent to sit as a juror if he says he will try the case fairly and impartially even though he has a fixed and determined opinion of defendant's guilt or of his innocence as unmovable as Gibraltar. During the examination of talesman as to his qualifications to sit as a juror, when the talesman stated that he had formed an opinion as to the merits of the case, the court asked: "Is it such an opinion that it would not yield to the facts presented here in the court room before you for your consideration?" The talesman answered: "It would take evidence to change my opinion." The court then asked: "The opinion you now have—could the opinion you now have be removed by evidence you heard in this court, and altered and changed?" And the answer was: "Yes, by evidence it could." The challenge to the juror was denied.

Another talesman who had formed an opinion on the merits stated that "it could be changed; as the case went on, it could be changed." Challenge to such juror was also denied. At least three jurors were of this type. It seems elemental to the writer that a talesman who has an opinion on the question to be decided by the jury, which opinion requires evidence to change or remove, is ipso facto disqualified as a juror. Of course, jurors are not required to be blank minds, but they should be men with free and open minds; men who can enter the jury box at the beginning of the evidence utterly disregarding and oblivious to anything they may have heard or read, or any opinions or impressions they have formed. The question is not: Can your opinion be changed, but can you utterly disregard your opinion? It is not as to whether the opinion is of such fixity that it cannot be changed by evidence, but is it of such fixity that you cannot disregard it without any evidence? As far as such juror is concerned the party litigant comes to the batter's box with two strikes charged against him. It is small consolation to

say: "If you knock a home run on the first ball pitched, the handicap of two strikes against you before you came to bat didn't hurt you." Who would contend that in a championship basket ball game it is fair to give one team, as the game opens, ten free throws at the basket, saying to the other team: "If you can score enough field baskets more than your opponents to offset the ten free throws, why you win anyway so you can't complain?"

The rule as laid down by the overwhelming weight of authority, and as repeatedly declared in this jurisdiction is, a talesman is not disqualified as a juror because he has formed or expressed an opinion as to the guilt or innocence of the accused if such opinion is one that the juror can and will completely lay aside and disregard so he can try the case fairly and impartially upon the evidence submitted in open court like he would if he had heard nothing of the case or formed no opinion whatever. In People *v.* Hopt, 4 Utah 247, 9 P. 407, 120 U. S. 430, 7 S. Ct. 614, 30 L. Ed. 708, the question was raised as to a denial of a challenge of a juror for implied bias. The Utah court disposed of the matter on the ground that when the jury was sworn the defendant had three unused peremptory challenges and so could not complain. The United States Supreme Court affirmed on the same ground. It should be borne in mind that both courts point out that the juror, Abbott, testified that while he had long before formed an opinion based upon what he read in the newspapers "he could go into the jury box and sit as if he had never heard of the case" and that unless "what he had heard before turned out to be the facts in the case he had no opinion, and that he could sit on the jury and try the case without reference to anything he had heard." In Thiede *v.* Utah, 159 U. S. 510, 40 L. Ed. 237, 16 S. Ct. 62, the court disposes of the question thus: "These jurors testified substantially that at the time of the homicide they had read accounts thereof in the newspapers, and that some impression had been formed in their minds from such reading, but each stated that he could lay aside any such impression and try the case fairly and impartially upon the evidence presented." In State *v.* Haworth, 24

Utah 398, 66 P. 155, four of the challenged jurors had formed no opinion as to the guilt or innocence of the accused. It did appear they had formed an opinion that deceased had been murdered. (A point on which there was no dispute.) One juror stated that from what he had read he had formed an *opinion or impression* as to the guilt or innocence of the accused, but that he could *weigh the evidence independently of what he had read and heard* and would not be influenced by such matters or opinions formed therefrom. These jurors were held not disqualified. They all come with the rule for which the writer is contending.

"A person who has formed an opinion by conversation with witnesses is, under Neb. Crim. Code, Sec. 468, incompetent to sit as a juror, notwithstanding he may swear that he can render a fair and impartial verdict." Cowan *v.* State, 22 Neb. 515.

"A juror is not disqualified because he has formed an opinion of greater or less strength from what he he has read in newspapers, if he testifies that he can render a verdict according to the evidence, uninfluenced by previous opinions." Rizzolo *v.* Com., 126 Pa. 54; West *v.* State, 79 Ga. 773; Garlitz *v.* State, 71 Mo. 293, 4 L. R. A. 601; People *v.* Gage, 62 Mich. 271.

"A juror having an opinion in a case, and whose declaration that he could render an impartial verdict is qualified by a doubt, is incompetent, under N. Y. Code Crim. Proc., Sec. 376." People *v.* McQuade, 110 N. Y. 284, 1 L. R. A. 273.

"A juror stating that he is prejudiced in defendant's favor, but that he can find a verdict upon the evidence alone, is properly rejected on a challenge for cause." Giebel *v.* State, 28 Tex. App. 151.

"The statement of a juror on cross-examination, that he thinks he can try the case fairly and impartially and render an impartial verdict from the evidence, without being biased by his previously formed opinion, although it will take evidence to remove it, renders his rejection a matter within the discretion of

the trial judge." Young *v.* Johnson, 123 N. Y. 226, affirming 46 Hun. 164.

"The opinion which renders a juror incompetent must be such as would influence his judgment." Spangler *v.* Kite, 47 Mo. App. 230.

"A juror called in a murder case is not incompetent because he heard talk about the case at the time of the offense, and may then have had some opinion, where he stated that *he has no opinion at the time of the trial*, stands impartial, and can give the prisoner a fair trial." Lyles *v.* Com., 88 Va. 396. (Italics ours)

"One who has formed an opinion which it will require evidence to remove is disqualified for actual bias as a juror in a murder trial, although he states that he will try the case on the evidence and the law." State *v.* Coella, 3 Wash. 99; contra. Com. *v.* McMillan, 144 Pa. 610.

"A juror who has formed and expressed a positive opinion of the guilt of a prisoner, and of certain specific and material facts, although it is based solely on newspaper accounts, is disqualified, even if he declares that he can render a fair and impartial verdict upon the evidence alone." Coughlin *v.* People, 144 Ill. 140, 19 L. R. A. 57.

(Above quotations 40 L. Ed., pages 238, 239.)

We quote from the syllabus in Scribner *v.* State (Okla.), 108 P. 422:

"The opinion necessary to disqualify a juror must be one based on what purports to be facts, and one that will combat the evidence.

"The trial court is not limited by the answers made by the juror, but must be satisfied from all of the circumstances as well as the examination that the juror is not prejudiced against the accused.

"Where the juror says that he has an opinion, the accused should be given an opportunity to examine him fully as to the extent of his opinion."

In the concurring opinion of Mr. Justice Furman, we ead:

"When a juror states that he had an opinion as to the guilt of a defendant, he is not made competent to sit in the case merely because he may state that he can and will lay this opinion aside if taken on the jury, and give the defendant a fair and impartial trial, and be governed alone in making up his verdict by the testimony of the witnesses and the charge of the court. The juror is not the judge of his own competency, of his own impartiality, and of his own freedom from prejudice. No statute can clothe him with such judicial discretion and power. . . . It is the judge, and not the juror, who is charged with the duty of passing upon the competency of the juror, and in the discharge of this duty the judge may have recourse to any means of information within his power. In fact, he should carefully investigate every source which would be calculated to throw any light upon the competency of a juror, and if the judge is not entirely satisfied of the competency of the juror, he should be excused. In re Johnson *v.* State, Okla. Crim. 348, 97, P. 1070.

". . . The court erred in not permitting this question to be answered. While it is true that the court would not be bound by answers of the juror, yet, when it is disclosed that a juror has an opinion, in all fairness the court should permit the most searching cross-examination of the juror as to the origin, extent and probably effects of such opinion. . . . But it may be said that the defendant is guilty, and that therefore it is immaterial as to whether the law was complied with. Such a statement as this is the first step toward lynch law, and if recognized by this court, would wipe out and destroy every constitutional right, and would establish a precedent which, if followed, would result in arbitrary punishment in the name of the law. . . ."

The question as to the juror's qualification is not if his opinion will yield to evidence but, can he lay it aside and disregard it so as to give the evidence its proper weight on the question: Is guilt proved without wasting part of its strength and force in overcoming preconceived opinions on that matter? In other words, not can the opinion be overcome by evidence, but can and will the juror disregard such opinion and weigh the evidence fairly and impartially? I think the trial court erred in turning down the suggestion and request of defense that the state of mind of these jurors, and the fixity of their opinion be further explored before they be accepted as jurors. On the record as it stands, I think these jurors were disqualified and incompetent to sit as jurors, and the cause should be reversed.

There are two other matters in the record I think were error but since no exception was taken to them below, they need not be discussed.

PRATT, *Justice*, not participating.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 60

JOSEPH WHITE MUSSER, GUY H. MUSSER, CHARLES FREDERICK ZITTING, ET AL.,
Appellants,

vs.

THE STATE OF UTAH

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

BRIEF OF APPELLANTS

CLAUDE T. BARNES,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 60

JOSEPH WHITE MUSSER, GUY H. MUSSER, CHARLES FREDERICK ZITTING, ET AL.,
Appellants,

vs.

THE STATE OF UTAH

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

BRIEF OF APPELLANTS

To the Honorables, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

A.

RESUME OF FACTS

1.

On April 21, 1944, thirty-two defendants were charged in the District Court of Salt Lake County, Utah (a State Court) with conspiracy to violate public morals. If we delete from the information all of the overt acts that were eliminated by either that court or the supreme court of

the State of Utah for lack of proof, the information reads as follows: (T. 1, 7, 48, 49, 60)

> "That the said above named defendants at the time and place aforesaid, did wilfully and unlawfully, agree, combine, conspire, confederate and engage to, with and among themselves and to and with divers other persons to your affiant unknown; to advocate, promote, encourage, urge, teach, counsel, advise * * * polygamous or plural marriage and to advocate, promote, encourage, urge, counsel and advise * * * the cohabiting of one male person with more than one woman and in furtherance and pursuance of said conspiracy and to effect the object thereof, did commit the following overt acts:
>
> 3. That said defendants on the first day of July, 1942, purchased a house loacted at 2157 Lincoln Street in Salt Lake City, Utah.
>
> 9. That the said defendants at Salt Lake County, State of Utah, in 1942 and 1943, attempted to convert Helen Smith to believe in and to live in polygamy."

2a

The case came on for trial in October, 1944, but such was the publicity that it was necessary to examine 200 talesmen to get a jury, and even some jurors, finally accepted by the court over the objection of defendants, had such fixed opinions that they stated it would require evidence to change their pre-determined conclusion (T. 10-17). (This denial of constitutional rights will be discussed later.)

2b.

One of the original defendants, Heber Smith, being ab-

sent in the army, the case against him was not dismissed but deferred; nevetheless his former wife, Helen Smith, was permitted to testify concerning what he privately had said to her to convert her; and that denial of due process—the testimony of a wife against her husband—is likewise herein later discussed. (T. 28).

2c.d.

Testimony showed that the defendants purchased a church building wherein they held religious meetings and taught all of the original tenets of the Mormon Church, including the revelation contained in the Doctrine and Covenants (Sec. 132) concerning a plurality of wives as essential to exaltation in the celestial kingdom of God (T. 18-28). *There was no evidence of either the performance or practice of plural marriage;* and such alleged overt acts were taken from the jury. (T. 8)

2e.

The defendants were all convicted and sentenced to a term of one year each, notwithstanding they had constantly pleaded their rights under the Federal Constitution (T. 41-42).

3.

On appeal to the Supreme Court of Utah, that court eliminated all but 18 of the defendants; adjudged that there had been no denial of due process in the selection of the jury or in the wife against husband testimony; and made an astonishing ruling as follows:

> "We therefore hold that an agreement to advocate, teach, counsel, advise and urge other persons to prac-

tice polygamy and unlawful cohabitation, is an agreement to commit acts injurious to public morals within the scope of the conspiracy statute." (T. 52).

4.

Certiorari was granted by the Supreme Court of the United States on April 28, 1947. (T. 88).

B.

POINTS INVOLVED

Three major points are herein involved, all of them having been properly brought to the attention of the lower courts by the defendants, claiming rights under the Amendments to the Constitution of the United States:

1. It is a denial of Constitutional rights for a court to compel a defendant to accept a juror who states that he has such a fixed opinion on the merits of the case that it will require evidence to overcome it.

2. It is a denial of Constitutional rights for a court to permit a wife to testify against her husband in a proceeding in which the action against him and others is as to him only deferred, not dismissed.

3. It is not a crime to advocate the practice of plural marriage as a religious doctrine essential to the highest salvation; and it is not a crime to hold religious services wherein such an expression of religious faith is given.

Since in this case the defendants are not charged with the *practice* of plural marriage, it involves solely their right *to give speech* concerning it. In other words, may a citizen of the United States advocate the practice of plural

marriage now as a religious tenet essential to eternal salvation?

C.

ARGUMENT

1.

THE JURY SELECTION

This case came to trial against thirty-two defendants; and before a jury was finally selected, 200 talesmen were called. The defendants exhausted *all* of their peremptory challenges; nevertheless the court refused to discharge jurymen who had formed or expressed such opinions against them that it would require evidence to change such preconceived verdict. Perhaps in few cases in the history of American jurisprudence were more talesmen examined; yet, withal, the judge deemed it necessary to accept jurymen despite their bias. The defendants were thus convicted *before* they were tried; and *ipso facto* denied the due process of an impartial trial and the equal protection of the law. The defendants had to (a) overcome preconceived convictions, and (b) then proceed to prove that beyond a reasonable doubt they were not guilty. (T. 10-17). It was an impossible undertaking from the start; hence the defendants stand before this Court convicted and sentenced to one year's imprisonment for talking, and talking alone.

The extraordinary feature of the case is, that it involves not one right but many of the freedoms—religion, press, speech and assemblage. In other words, the defendants in a lawful assemblage of worship spoke and printed that for which they are to be incarcerated. Utah

has three populations: A dominant Mormon people who regard the defendants as heretics; a Gentile minority hating anything Mormon; and—the defendants—, hence the defendants were compelled to accept a jury pre-determined against them. Note this: (T. 12):

> "If he can come into this court without hearing any evidence and have an opinion—if it takes evidence to change that mind, he is not eligible. That is the law."
>
> "The Court: Not in this court, I am sorry to say. The challenge is denied."

There we have the problem in a nutshell: is a defendant denied due process and impartial trial when the jurymen thrust upon him state that it would take evidence to change their preconceived opinions?

Despite innumerable state cases to the contrary, and decisions from this court, I am not convinced of the logic of holding that the privileges and immunities guaranteed by the 14th Amendment against state infringement refer only to the freedoms of "religion", "speech", "press", "petition" and assembly of the first Amendment, for the matters of "unreasonable searches", double jeopardy, self incrimination, "just compensation", "public trial by an impartial jury", confrontation "with witnesses", "compulsory process", "excessive bail", "excessive fines", and "cruel and unusual punishment", which appear in the 4th to 8th Amendments inclusive, seem equally important. Indeed, between the time of the ratification of the first ten Amendments on December 15, 1791 (by Virginia, the 11th state of the then 14) and the time of the approval of the 14th Amendment, on July 9, 1868 (by South Carolina, 28th state of the then 37), the people had

77 years to think the first ten Amendments over and learn to like them. New states were coming in rapidly, the old ones did not want the new ones to come forward with statutes contrary to the rights and immunities of the first eight amendments, which they had learned to cherish.

Fearful of the broad denial of State sovereignty contained in the 14th Amendment, Ohio and New Jersey even withdrew their ratification; but it was too late—Congress, on July 21, 1868, passed a joint resolution declaring the amendment a part of the Constitution. (See Rules U. S. Senate, 1939, p. 417). To this day Kentucky and Maryland have not ratified the 14th Amendment; and Oregon withdrew consent three months after it became law. Thus the states realized that they were curbing themselves greatly, for there is nothing in the 14th Amendment to indicate that it has only the rights of the first Amendment in mind. It intended all of the rights and immunities of the fourth to eighth amendments as well, so far as I can see; and Amendment 6 provided for a "public trial by an impartial jury". All citizens of any State are *ipso facto* citizens of the United States as well, hence they are entitled to the privileges and immunities of the first eight amendments, for to hold otherwise were to deny their citizenship in the United States.

It was natural and correct for the States during the 77 years after the enactment of the first ten Amendments to hold that they applied only to the Federal government; indeed it was not until about the turn of the century that this court began to appreciate the fact that free speech and the like were restrictions on the States.

In other words, the first Amendment was assumed to

be within the jurisdiction of this court as a restraint on the States. What was wrong with the 4th, 5th, 6th and 8th Amendments on such an assumption? Not to be put twice in jeopardy, not to be given a fair trial by an impartial jury, are denials of rights just as important as denial of free speech.

A review of the debate in Congress prior to the adoption of the joint resolution proposing the 14th Amendment convinces one of these conclusions: (a) the Civil War having just closed, much of the debate came under the head of "Reconstruction", (b) it seems to have been taken for granted that a native born citizen of the United States had all of the privileges and immunities of the first eight amendments to the Constitution of the United States; (c) the main debate was on the right of Indians, Negroes and Chinese to enjoy them; (d) *the fourteenth amendment was a condition upon the re-entry into statehood of those southern states that had imposed cruel and unusual punishments upon such of their residents as had manifested sympathy towards the North;* (e) the 14th Amendment was an injunction against all states who sought, either by statute or legal interpretation, to deny residents within their domain, the immunities and privileges set forth in the first eight amendments; (f) I did not find any passage which would lead one to believe they had in mind the rights and immunities of the first amendment only.

For instance, on May 10, 1866, Mr. Bingham of the House (The Congressional Globe, 1st Sess., 39th Cong., Pt. 3, p. 2542), speaking on privileges and immunities of the proposed 14th Amendment, said:

> "Many instances of State injustice and oppression have already occurred in the State legislation of this

> Union, of flagrant violations of the guaranteed privileges of citizens of the United States, for which the national government could furnish by law no remedy whatever. Contrary to the express letter of your Constitution, 'cruel and unusual punishments' have been inflicted under State laws within this Union upon citizens, not only for crimes committed but for sacred duty done, for which and against which the Government of the United States had provided no remedy and could provide none. * * * It was an opprobrium to the Republic that for fidelity to the United States they could not by national law be protected against the degrading punishment inflicted on slaves and felons by State law."

Nevertheless, if we rely on the 14th Amendment alone as applicable only to the first, the question arises: was the selection of the jury in this case so obviously unfair as to be a denial of due process and a refusal to give the defendants the equal protection of the laws? Put it this way: If a State grant a jury trial, then that trial must be a fair one, for, if not, it violates not only statutory but also common law and the Fourteenth Amendment. In other words, the machinery of the law must work equally and fairly for all. The question is: not, "were the defendants given a *proper*", but "were the defendants given a *fair* trial?"

If a fair and impartial jury is a cogwheel of that machinery, as it is in Utah, then the 14th Amendment must condemn any trial that lacks that wheel. This court did assume jurisdiction over just such a matter on those very grounds in the Anarchists case (1887) by writ of error to the State of Illinois, 8 S. Ct. 21, 123 U. S. 168, 31 L. ed. 80.

"Due process of law" means well recognized principles, privileges and immunities, with rules so widely honored that they represent not only the common law but also the conception of justice of democratic peoples desirous of affording all the people "the equal protection of the law". Even the Ordinance of 1787, concerning the government of the territory northwest of the river Ohio, passed by the confederate Congress on July 13, 1787, provided (Article II of Sec. 14) that the "inhabitants" "shall always be entitled to the benefits of the writs of *habeas corpus* and of trial by jury * * * and of judicial proceedings according to the course of the common law."

If in a race between two automobiles one has to overcome the prejudice or handicap of some water in its gasoline, even racers would not call the contest a fair trial; if gasoline represent the jury, we are in the same predicament here. *There has not been equality or impartiality in the machinery or process of the law.* The defendants exhausted all of their peremptory challenges—they were compelled to accept prejudice, aye even an employee of their bitterest enemy, the dominant opposing religious sect!

We strongly commend the dissenting opinion of Chief Justice Larson of the Supreme Court of the State of Utah (T. 69) for it clearly demonstrates the astonishing conclusion that a juryman "with a fixed and determined opinion of defendants' guilt or of his innocence as immovable as Gibraltar", is nevertheless, under the majority opinion impartial!

In this case the prospective juror McDonald (T. 10) had

an opinion; had expressed it to others; had an opinion now "as to the merits of the case"; and the opinion "could be changed; as the case went on it could be changed". The Court accepted him. Mr. Deeker (T. 13) had an opinion on the "merits of the case". He said: "It would take evidence to change my opinion. Does that answer it? I have formed an opinion. I couldn't help it." The Court accepted him. The talesman Arnold (T. 15) had not only formed an opinion, but such opinion was based on "information about this case other than the public press and the people talking about it." The Court accepted him.

Such proceedings shock one's conception of an "impartial trial by jury", for the defendants exhausted all of their peremptory challenges.

In this case not only did the trial judge, but the Supreme Court of the State of Utah also disregarded a case that had become sacorsanct in the history of Utah's jurisprudence, a case dating indeed from Volume One of the Utah reports. It is so apropos in its exact similarity that we must quote from it in extenso. It is only fair to state, however, that in the hectic period of defending twenty-seven cases simultaneously, involving either trials or appeals, all growing out of the polygamy persecution of 1944, we failed to call this all important case to the attention of either court. The shortcoming in that respect nevertheless in no way affects its validity as a binding precedent. The all important thing is that we were right in our statement of the basic principles of the law, even if, as counsel, we did not have legal anthologies at the tips of our tongues. The case is: Conway v. Clinton, I Utah 215, —the pertinent part of the opinion being as follows:

"Mr. James Lowe was also called as a juror, and being examined as to his qualifications, testified as follows:

Plaintiff—Do you know anything about this case?

A. I do; I have heard it spoken of.

Q. From what you have heard, have you formed or expressed an unqualified opinion?

A. I have.

Q. Did you hear what purported to be the facts?

A. No, I have not; I don't know anything about it only what was spoken of on the streets, and read about in the papers.

Q. Then the opinion you formed is an opinion based upon that rumor?

A. Yes, sir.

Q. Do you say that that opinion is an unqualified one?

A. It is qualified by what I have heard.

Q. Have you any bias or prejudice for or against either of the parties?

A. No, sir.

Q. Is there anything to prevent you from rendering an impartial verdict?

A. No, sir.

Q. Have you any business relations with either of the parties?

A. I guess not, I don't know of any.

Q. You reside in town?

A. Yes, sir.

Q. Did you in August, 1872?

A. Yes, sir.

Q. You think you could render an impartial verdict?

A. I could from the testimony.

Q. What did I understand you to say in reply, in regard to an unqualified opinion?

A. At the time when I heard of the case I formed an opinion; it was only based on the rumors.

Passed by plaintiff.

Defendants—I understood you, Mr. Lowe, that at the time you heard the rumors you had formed an opinion?

A. Yes, sir.

Q. And at that time it was an unqualified opinion?

A. Yes, sir.

Q. Then it would take evidence to remove that opinion?

A. Yes; it would take evidence to remove it.

Q. How far did you live from the place where it happened?

A. I lived in the Seventh Ward at the time.

Q. I understand you formed the unqualified opinion from the reports?

A. Yes, sir.

Q. You did not talk with any person that knew anything about it?

A. No, sir.

Q. Would not these reports bias your mind still, unless it was removed by testimony?

A. It would.

"Upon this examination the defendant challenged for cause under the sixth subdivision of the 163d section of the code, which gives a challenge where the juror has formed or expressed an unqualified opinion or belief as to the merits of the action. The challenge was denied and the juror sworn in the cause.

We can see no reason for disallowing this challenge. The juror says emphatically that he has formed an unqualified opinion, and though in one answer he says he thinks he could render an impartial verdict, yet in the conclusion of this examination he repeats that he had formed an unqualified opinion, and that it would bias his mind unless removed by testimony. To a juror whose mind is thus freighted with definite opinions of the merits of a case, the law justly interposes the right of a challenge. The law intends, and it is the parties' right, to have jurors who are impartial, and whose minds are not embarrassed with unqualified, preconceived opinions of the case. Nor is it material upon what his opinions are founded, whether upon rumor or fact. It is the unbiased state of mind that is requisite, so as to enable the juror with candor and impartiality to decide upon the rights of litigants submitted to his consideration.

"It is suggested that the defendants did not make use of their peremptory challenges, and as they might have challenged these jurors peremptorily and did not, the objection should be regarded as waived, and the error as not prejudicial. If the doctrine thus stated were to be regarded as correct, of which we are not satisfied, still it would not work a cure of the error; for it appears that the Defendants exercised two peremptory challenges and could not therefore have had but one left, while two incompetent jurors were sworn. But it should be further observed that while it appears that the defendants used two peremptory challenges, it does not affirmatively appear that they did not use more, nor that all their challenges were not exhausted. When error appears upon the record, to avoid its effects resort cannot be had to presumption, but can only be removed by matter affirmatively shown by the record. We think the challenges were erroneously denied."

Thus in the present case the defendants were denied the *fair process* of the law as well as the equal protection thereof, not only by Utah precedent but also by the due process clause of the 14th Amendment. Under that Amendment *the Supreme Court of the United States is the guardian of fairness and impartiality in legal procedure.* In their desperation the defendants exhausted *all* of the peremptory challenges *allowed by the Court*—everyone seemed pre-determined against them; and the trial became a mockery of justice.

Since the foregoing was written for the printer, three extraordinary decisions have come to my desk, all of them reported in the advance sheets of the Supreme Court Reporter, dated July 15th, 1947. They are:

Fay v. People of N. Y., 67 S. Ct. 1613;
Adamson v. People of California, 67 S. Ct. 1672; and
Foster v. People of the State of Ill., 67 S. Ct. 1716.

I get much comfort from the Fay case where, in rendering the opinion of the Court, Mr. Justice Jackson wrote:

> "Society also has a right to a fair trial. *The defendant's right is a neutral jury*". (Italics inserted.)

Mr. Justice Reed, in the Adamson case, admitted that the due process clause of the 14th Amendment protects a "fair trial".

I believe that is exactly the point for which we are herein contending, although the Court apparently derives the word "neutral" from the word "due" in the due process phrase of the 14th Amendment; whereas I would derive it from not only that, but also the words "impartial jury" in the 6th Amendment.

I must admit that the Adamson case, affirming the right of counsel to comment on a defendant's refusal to take the witness stand in his own behalf, and the Foster case affirming a denial of counsel, are against what I have heretofore argued herein, namely, that all eight first amendments were carried into the fourteenth; nevertheless I am still convinced that I am right. The American people will be shocked to discover that their cherished Bill of Rights is not what they thought. The very exhaustive and epochal dissenting opinions make my mild efforts herein very weak indeed; but I have decided to allow my observations to stand as they are, especially as I did considerable research into Congressional debates and may have at least a fly speck of additional evidence there. One thing strikes me forcibly: How can due process be differentiated from fair process? For after all that is what I am contending for here. For many years this Court has been selecting rights of the first eight amendments as included within the fourteenth; hence it seems to me high time to assert at last that "unreasonable searches", double jeopardy, self-incrimination, "public trial by an impartial jury", confrontation with witnesses, "excessive bail", "excessive fines", "cruel and unusual punishments" are matters as vitally included in the 14th Amendment as the freedom of religion, press, assembly and petition. To hold otherwise is to rewrite the school books of the Nation.

It seems to me that this lofty Court should recognize, that ever since 1889, when in Chicago v. Minnesota, 134 U. S. 418, 10 S. Ct. 462, 33 L. Ed. 870, the due process clause was discovered, this Court has been segreting, one by one, the rights and immunities of the first eight amendments as within the purview of the fourteenth. I cannot

express it so brilliantly as did Mr. Justice Black and Mr. Justice Douglas in their dissenting opinion in the Adamson case *supra* (67 S. Ct. 1690 et seq.); but apparently this Court held, in the following order, that the 14th Amendment included rights of the first eight Amendments:

1. Due process, 1889, Chicago v. Minn. (supra).
2. Contracts, 1896, Allgeyer v. La., 165 U. S. 578, 17 S. Ct. 427, 41 L. Ed. 832. Twining v. N. J., 1908, 211 U.S. 99, 29 S. Ct. 19, 53 L. Ed., 97, comes in in here as a confirmation of the right of the states to abridge the rights of the first eight Amendments, but left to this Court to decide what is "due process".
3. Right to counsel, Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (now apparently invalidated by Foster v. Ill., 67 S. Ct. 1716).
4. Cruel and Unusual Punishment and Double Jeopardy: State v. La., 329 U. S. 459, 67 S. Ct. 374.
5. Informed of the Charge Against Him: Snyder v. Mass 291 U. S. 97, 54 S. Ct. 330, 78 L. Ed. 674, 90 ALR 575.
6. Just Compensation: Chicago v. Chicago, 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 976.
7. Freedoms of Religion, Press, Speech, Assembly, Petition: Everson v. Board of Ed. 67 S. Ct. 504; Bridges v. Cal. 314 U.S. 252; 62 S. Ct. 190, 86 L. Ed. 192; 159 ALR 1346.

In view of the learned opinions in the Fay, Adamson and Foster cases (*cit. supra*), as typified by Mr. Justice Frankfurter's point in the Adamson case, to the effect that, when the Fourteenth Amendment was adopted, the constitutions of nearly half of the states "did not have

the rigorous requirements of the Fifth Amendment for instituting criminal proceedings through a grand jury", I am constrained either to back down or elucidate. My conclusion is: the Fourteenth Amendment had in mind those rights which were "implicit in the concept of ordered liberty" as distinguished from mere procedural rights. Let us call them (A) Basic rights and (B) Procedural rights. Following such an analysis we have as:

A.

BASIC RIGHTS

I. Freedom of Religion
Freedom of Speech
Fredom of Press
Freedom of Assembly
Freedom of Petition
II. Right to Bear Arms
III. Right Against Soldiers' Occupying One's Home.
IV. Right Against Unreasonable Searches and Seizures
V. Right Against Double Jeopardy
Right Against Self Incrimination
Right to Due Process of Law
Right to Just Compensation
VI. Right to Public Trial by an Impartial Jury
Right to Confrontation by Witnesses
Right to Information on the Accusation
Right to Compulsory Process for Defense
Right to Assistance of Counsel
VIII. Right Against Excessive Bail
Right Against Excessive Fines
Right Against Cruel and Unusual Punishments.

B.

PROCEDURAL RIGHTS

V. Indictment by a Grand Jury

VII. Jury Trial in Suits of $20.00 or More.

If this discrimination between basic and procedural rights be adopted as the concept of the Fourteenth Amendment it will solve many of the differences in philosophy now before the Court. Procedure refers to method; the basic rights refer to fairness and fundamental justice.

I feel that in the Adamson case Mr. Justice Frankfurter has unduly emphasized the procedural rights above—grand jury and $20 jury trial. They were but the tail of the faithful watchdog known as the Bill of Rights, and without that tail Bill is the devoted Airedale we home folks expect him to be.

Furthermore, as I read Mr. Justice Black's quotations from Senator Howard and Mr. Bingham (67 S. Ct. 1703, 1707), wherein the Senator detailed all eight of the first amendments except those set forth above as procedural, and Mr. Bingham read all eight, I am convinced that the foregoing analysis is correct.

I blame the Congress of 1866 for not enumerating what it meant by "privileges and immunities"; but the members doubtless took it for granted that everyone knew of the much cherished rights of the first eight amendments. In all of the debates there appears to have been little misunderstanding on what the privileges and immunities were—the grave question was whether the States desired to be bound to uphold them.

Nevertheless, in this case, the majority, as well as the minority of this Court, must admit that the due process

clause of the 14th Amendment includes a fair trial. There can be no "fair trial" with a pre-opinionated jury, and such is the conclusion of the Fay case.

2.

A WOMAN TESTIFYING AGAINST HER HUSBAND

Sec. 104-49-3 of the Utah Code 1943 reads:

> "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate. Therefore, a person cannot be examined as a witness in the following cases:
>
> (1) A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent; nor can either during the marriage or afterwards be, without the consent of the other, examined as to *any* communication made by one to the other, during the marriage; but this exception does not apply to civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor for the crime of deserting or neglecting to support a wife or child, nor where it is otherwise specially provided by law."

It was held in Bassett v. United States, 137 U. S. 496, 34 L. Ed. 762, 11 S. Ct. 165, that polygamy was not a "crime committed by one against the other" within the meaning of this section.

It will be noted that the statute reads "during the marriage or afterwards be, without the consent of the other". In the case at bar the husband never gave his consent; he was absent and his attorney objected strenuously in his

behalf. The action against him was merely severed, deferred; and to this day it has not been tried. The Court reluctantly allowed the wife to testify, thus not only violating Utah's Constitution, Art. I, Sec. 12, but also the statute itself.

The common law rule is stated by Jones' Commentaries on Evidence, 5:4046 (2nd Ed.), as follows:

> "At common law the rule prevails that all private conversations or communications between husband and wife are to be regarded as confidential and privileged and cannot be divulged by either when on the witness stand, either during the existence of the marriage relation or after its termination by death or divorce."

The Utah statute is very broad; it reads "any" communication, not just "confidential" ones; so a wife may not be examined concerning *any* statement her husband might have made to the repetition of which he objects. This applies even if he be dead, in which case the objection is presumed. Obviously there can be no criminal prosecution against a dead person; so her competency to testify is much stronger if he be living and his attorney objects. The Utah statute requires an active consent, not merely an absence of objection.

Thus the defendant herein was denied due process under the 14th Amendment of the United States Constitution; for he has not yet been tried; and the other defendants were convicted on a private conversation between this very man and his wife of which conversation they knew nothing.

— The Bassett case (*cit. supra*) took it for granted that under the same Utah statute as exists now a wife could not testify against her husband. The only question was whether polygamy was a crime against her. The Court held it was a crime against "the marital relation" not her, and she could not testify.

We have read with much interest the old case of Twining v. New Jersey (1908), 211 U. S. 78, wherein self-incrimination was held a matter for the states to decide, and not a privilege or immunity under the 14th Amendment. In the light of the modern conception of the law, we regard that decision as entirely erroneous; and that the 14th Amendment was meant to include all of the relevant provisions of the first eight Amendments. We see nothing in reason to say that the arrow of the 14th Amendment pointed only toward the first; for it indicated and insisted upon the due process or machinery of the law. The defendants were convicted by a denial of that process. It may be admitted that there is nothing in the first eight amendments concerning evidence *per se;* that is, this Court is not called upon in a State appeal to review the evidence as if it were a court of equity and constrained to determine the balance thereof; but it does have within its lofty power the right to determine whether anyone has been denied the regular machinery of the law. It is not a question of what Mrs. Smith said, but did she have a right under due process to say it?

Since the foregoing was written, the Adamson decision (*cit. supra*) has been rendered. With sincerity, deep respect and cordiality I expostulate on it, not only as counsel but also as a citizen aiming to preserve our constitutional heritage, for it emasculates the Bill of Rights and

if we do not stop that Bill will be but a skeleton in a land of supposed virile freedom. It is both a shock and a disillusionment to the Nation. No one admires the erudition of this Court more than I, no one more concedes the exalted purity of its motives, but I think the majority forgets that when the 14th Amendment was passed there had been 77 years of decisions holding that the first eight amendments did not apply to the states. That amounted to a tremendous carry-over of legal precedents that influenced early contemporary jurists mightily who shied from any rights the 14th Amendment did not specifically detail. "Privileges and immunities" was a vague phrase that they did not care to analyze. History has the habit of understanding great movements better than did contemporaries. The South was practicing violations of the basic conception of American rights, including those against "impartial" juries and self-incrimination; so the Union States decided once and for all to make those rights not only a condition of re-entry into the United States by the Southern States, but also a binding force on states new or old. What were they talking about when they spoke of "privileges and immunities" of citizens of the United States if not the rights of the first eight amendments? The fiction that differentiates between a citizen of the United States and a citizen of a State does not appeal to me. The 14th Amendment refers to "all persons born or naturalized in the United States" no matter where they reside in this country. Citizenship in a State is a local matter; but, whether a man have citizenship in a State or not for the purpose of voting, he still has the protection of the fundamental Bill of Rights.

Even as I write this, let me say, with a humility somewhat aroused by disillusionment, I have before me the very volume that is given aliens by the Immigration Department to assist them in comprehending the United States government and in passing citizenship tests. It is called: "Our Constitution and Government: Federal Textbook on Citizenship" by Catheryn Seckler-Hudson (U. S. Dept. of Labor, Immigration and Naturalization Service, Government Printing Office, Washington, D. C., 1940, 400 pp.) I submit that its entire contents would lead any alien to believe, that the first eight amendments of the Constitution of the United States are restraints on the States as well as the national government. I will pass over its glorification of freedoms of speech, press, religion, petition and assembly, and give just one quotation, which does not even suggest a difference between State and Federal Courts (p. 333):

> "If a person is accused of having committed a crime, our courts are required to regard him as innocent until he has been proved guilty. This prevents a person from being convicted without convincing proof of guilt. During a criminal trial the accused person need not testify unless he wishes to do so. Even if the person is found guilty, the court cannot order a cruel or unusual punishment or an unreasonably large fine. If a person has been arrested and tried for a crime and found not guilty, he cannot legally be tried a second time for the same offense."

In spite of all this, the due process clause of the 14th Amendment protects us here; for one of the most cherished concepts of the common law was that a wife could not testify against her husband. If "due process" upholds fair trial it must deny such procedure.

3.

FREEDOM OF SPEECH, PRESS, RELIGION AND ASSEMBLY

It cannot be too strongly noted, that the information herein contains not even a suggestion of a public emergency as a result of the preaching of the defendants; the attempt by her husband to convert one married woman was obviously of no public moment; so we are confronted with the bare problem—is it unlawful to advocate the present practice of plural marriage as a religious belief when no public emergency is even remotely suggested from such teaching?

Pillars of strength in our republic are the four freedom-cornerstones—press, speech, worship, assembly—for they were constructed, not by legislative enactment, not by judicial interpretation, but by the founding people themselves who virtually placed on each cornerstone the historic sign "*noli me tangere!*" This prosecution is an assault upon those rights, for it punishes the defendants not for *practicing* their religion, but for *expressing their views* concernng it.

This Court must be loath to creep into the position of arbiter of free speech and worship; for only the most extraordinary public emergencies should force it into that invidious role. It has sworn to uphold the Constitution, not weaken or destroy it.

There is a vast difference between words appealing to one's discretion and those resulting in direct and immediate injury without allowing discretion time to cogitate. To shout "FIRE!" in a theatre when there is no fire, as has been said, is a potent, immediate, direct wrong, often

more disastrous than silent physical force.

Persuasion, on the other hand, appeals to reason, discretion, free agency and the endowed sense of right and wrong. This sense of right or wrong is innate even in the lesser Primate, such as the apes, monkeys, marmosets and lemurs, to say nothing of the highest mammal—man.

People constantly approve or condemn radio talks, political addresses and sermons; and are so accustomed to the radical that they pay little more attention to the soapbox declaimer in our parks than to the chatter of monkeys a few rods away. Persuasion that results in riots and other public immediate emergencies is very rare, but if it do not, the feeling is "let him talk." It is the constitutional heritage of free speech that prompts the remark, for one does not have to listen.

It is the function of the courts to punish deeds, not words; and there are adequate laws applicable to deeds. Let people harangue and declaim, stump, spout, lecture and rant; let them discourse and sermonize—but punish only what they do.

When the late Franklin D. Roosevelt wrote the four freedoms of the Atlantic Charter, he placed first "freedom of speech and expression—throughout the world"; second, "freedom of every person to worship God in his own way—throughout the world". Yet this case sentences eighteen citizens to a year in jail for *expressing* their religious belief and advocating its present practice!

If the prosecution rely on the case of Davis v. Beason (Idaho, 1890), 10 S. Ct. 299, 133 U. S. 333, wherein the

court asserted that the teaching of polygamy is "aiding and abetting", we maintain that in the present case there was no crime to aid and abet. The charge that the defendants "did perform plural marriage" (T. 2) or practice it, was taken by the Court from the jury (T. 7) for lack of "any competent evidence in support" of it. Hence there was no crime to aid or abet; for the building of a church house and an unsuccessful attempt by her husband to convert a woman to a tenet of religious belief cannot be considered crimes in any language. The Court in the Davis case did not disassociate talk from acts; and therein reposes the error of its *obiter dictum*.

That the decision in the Davis case—that mere membership in an organization is criminal if the practice of one of its tenets is unlawful—is erroneous is apparent from the judgment in Herndon v. Lowry (Ga. 1937), 57 S. Ct. 732, 301 U.S. 242, 81 L. Ed. 1066, wherein the defendant was accused of soliciting members in the Communist party, whose object was to overthrow the government.

This Court, speaking through Mr. Justice Roberts, said:

> "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government.
> * * *
>
> "If, therefore, a state statute penalize innocent participation in a meeting held with an innocent purpose merely because the meeting was held under the auspices of an organization membership in which, or the advocacy of whose principles, is also denounced as

criminal, the law, so construed and applied, goes beyond the power to restrict abuses of freedom of speech and arbitrarily denies that freedom. * * *

"In its application the offense made criminal is that of soliciting members for a political party and conducting meetings of a local unit of that party when one of the doctrines of the party, established by reference to a document not shown to have been exhibited to anyone by the accused, may be said to be ultimate resort to violence at some indefinite future time against organized government. It is to be borne in mind that the Legislature of Georgia has not made membership in the Communist party unlawful by reason of its supposed dangerous tendency even in the remote future. * * * The appellant induced others to become members of the Communist party. Did he thus incite to insurrection by reason of the fact that they agreed to abide by the tenets of the party, some of them lawful, others, as may be assumed, unlawful? * * * In these circumstances, to make membership in the party and solicitation of members for that party a criminal offense, punishable by death * * * is an unwarranted invasion of the right of freedom of speech."

In Gitlow v. People (1925), 45 S. Ct. 625, 268 U. S. 652, wherein a man was accused of advocating the overthrow of organized government, Justices Holmes and Brandeis gave their now famous words of dissent as follows:

"The question in every case is whether the words used are in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that (the State) has a right to prevent."

In conformity with the foregoing, we have the decision

of this Court in Cantwell v. Connecticut (1940), 60 S. Ct. 900, 310 U. S. 296, wherein Jehovah's witnesses solicited money for a religious cause without a certificate and attacked the Catholic Church. The Court, through Mr. Justice Roberts, said;

> "Freedom of conscience and freedom to adhere to such religious organization or forms of worship as the individual may choose cannot be restricted by law. On the other hand it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. * * * In the realm of religious faith * * * sharp differences arise * * * the tenets of one man may seem the rankest error to his neighbor.
>
> "The essential characteristic of these liberties is, that under their shield many types of life, character, opinion, and belief develop unmolested and unobstructed." * * * "In the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction."

This case is extraordinary in that it involves the four freedoms: of speech, press, worship and assembly, for they are all included in the true expression of one's religious faith. Dare one henceforth quote the Mormon "Bible" (The Doctrine and Covenants) which commands plural marriage (Sec. 132) and say he believes *that princi-*

ple should be practiced today? Is that book to be censored, the sacred book of a million people? A book sold throughout the world? Or shall we say: "*talk as much as you like so long as you do not act?*" What mattereth it if a man shout from the housetops all kinds of esoteric eruditions and castigated advocacies? Does one have to believe or follow him? This great republic never has, and we hope, never will be afraid of free speech. Did people commit murder because Col. Silas Titus recommended it as the proper disposal of Cromwell, or because Thomas DeQuincey wrote of it as one of the fine arts? We must admit that in these United States even erudites are not of one mind on either ethics, sociology or religion; hence for this Court to exalt itself into the position of a mentor and decider were to attribute to itself divine discretion. The members naturally eschew such an exalted position.

If one advocates the practice of that which is unlawful he is in peril only to the extent that, if his words be taken seriously and immediately by people who commit acts amounting to a public emergency, he is liable with them for their deed; otherwise, much as his words may be objectionable, he may rely upon the immunity of the Fourteenth Amendment. This is as far as this Court can well go, and be true to its oath to uphold the Constitution. The prosecution herein should bear in mind that it is in these cases seeking to curtail free speech.

One way to destroy this republic were for this Court to become the censor of people's words. It has sufficient labor in the interpretation of law without becoming the official critic of speech, and especially religious speech concerning which multitudes disagree.

In Bridges v. California (1941) 62 S. Ct. 190; 314 U. S. 252; 86 L. Ed. 192, the defendant was fined for contempt for making certain comments on pending litigation. This Court (Justice Black rendering the opinion) said:

> "This Court said that there must be a determination of whether or not the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils. Moreover, the likelihood, however great, that a substantive evil will result cannot justify a restriction upon freedom of speech or press. The evil itself must be substantial * * *; it must be serious * * * and even the expression of 'legislative preference or beliefs' cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. * * * What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the further-most constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits *any law* 'abridging the freedom of speech or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context, of a liberty loving society, will allow."

Saying is not doing; talking is not acting. Let the modern Hermes, Desmothenes, or Cicero, aye even Lady Sneerwell, declaim or chatter, what mattereth it—the listeners are sufficiently punishable for their deeds.

The grave danger in a curb of free speech lies in the selection of a criterion. Cicero was acclaimed by the masses as an eloquent patriot, yet the wife of Mark Antony had him killed and his head nailed up by his tongue, under which she placed the sign, "Wag no more!" Who is to determine the matter when the members of one church often think the beliefs of other churches to be silly and baneful? Many intelligent men doubt immortality; others assert not only its existence but also its regulations and plans. Sermonizers far and wide therefore should be allowed to prate and prattle, jabber and jaw. Some like Marcus Antonius will be so eloquent as to cause their enemies to weep until an unbelieving Annius shears their curly locks away. Others will declaim by the wayside. Beset by "isms" on every side, Americans are accustomed to freedom of expression; they listen and use their own judgment. Who are we to deny them that Constitutional right? Who are we to judge their words? After all this Court consists of nine human beings with mundane frailties; and the Court is under the perpetual injunction to leave freedom of speech, press, worship and assembly alone.

The defendants advocated only the present practice of that religious doctrine, which their progenitors had taught as a sacred principle for a hundred years; and such teaching by written word had for that long a time been approved by the silence of the United States government.

If the Federal government for a hundred years has cared not to suppress the Doctrine and Covenants of the Mormon Church, which not only advocates but actually enjoins polygamy, there is little merit at this late date

in the contention that such teaching is contrary to public morals. (See the Symes decision T. 81). Like a *verbatim* and *literatum* translation of the Bible, many passages must be taken *cum grano salis;* but every religion to the intellectual man is to be taken *cam exceptione*, as Cicero said. We are today in an age of pity—the intellectual man tolerates the supernatural nonsense of the non-intellectual; yet we must endure one another.

Thomas Browne was right when he wrote, "The religion of one seems madness to another"; so, also, L. W. Reese:

> "Creeds grow so thick along the way
> Their boughs hide God."

Let Emerson have a word—"The religions we call false were once true—"; for it exactly describes the situation here; the Bible tells us that men beloved of God—David, Abijah, Rehoboam and Solomon—had respectively "many", "fourteen", "eighteen" and "seven hundred" wives; and all of the Mormon "prophets, seers and revelators" from Joseph Smith to the recently deceased Heber J. Grant, each had several to many wives to whom they paid the highest respect.

The defendants are diehards in that they believe, that a divine principle should not be subject to change by the exigency of man-made laws; and even watchers from the sidelines cannot forget that Blackstone wrote, "No human laws should be suffered to contradict" the law of revelation (1 Bl. Com. 42). Indeed, as pointed out by Clark ("Biblical Law", Sec. 55) "In the first American colonial grant in 1584 authority was conferred to enact statutes for the government of the proposed colony provided that 'they

be not against the true Christian faith'." (See Holy Trinity v. U. S. (1892), 143 U. S. 457 (grant by Queen Elizabeth to Sir Walter Raleigh) "and it may be argued", Clark continues, "that no law making body has ever been invested with power to enact statutes in violation with Biblical law". The same author goes on to say (Sec. 196, Sec. 197): "The patriarchal family was polygamous" . . . "The Bible seems to take polygamy for granted."

The defendants concede that it is unlawful to practice plural marriage, but they feel hurt and wronged when sentenced to a year's imprisonment for merely bearing their testimony concerning the truthfulness of the Bible and the Doctrine and Covenants upholding the principle. To them eternal salvation is as important as life; but they allow every man the right of free agency. (T. 34, 38).

Religions are a melee; Catholics, Huguenots, Episcopalians, Puritans, Congregationalists, Unitarians, Presbyterians Lutherans, Calvinists, Methodists, Wesleyans, Baptists, Anabaptists, Ubiquitarians Independents, Irvingites, Sandemanians, Glassites, Erastians, Antinomians, Davidists, Familists, Bible Christians, Bryanites, Dunkers, Ebionites, Arians, Eusebians, Jovinianists, Quakers, Shakers, Quietists, Stundists, Judaists, Boehmenists, Swenborgians, Trinitarians, Homoousians, Homoiousians, Adventists, Second Adventists, Mormons and Christian Scientists—each thinks he has the only way to immortality and fellowship with God. No wonder we have agnostics who say: "Prove all things." An intellectual man, faithful to his reasoning power, can only observe the scrimmage. Nevertheless we live in a country that affords each and every one of them free speech, freedom of worship and assembly. Who are we to say that, in our legal training requiring proof, this

one is wrong, that one right? No—let them all have their say, whether it be in favor of plurality of wives, theotherary, absolution or venomous snake worship.

Once in a while we come upon articles advocating the destruction of deformed infants or even the painless murder of all people over 65 years of age. Such adumbrations amount to nothing.

So far as we know this is the first case in the history of United States in which a sentence of imprisonment was given anyone for *expressing* his religious views; and the strangest feature about it is that the prosecution took place in a state the people of which for sixty years themselves suffered the direst religious persecution of American history. Europe has had its wars caused by sect fighting sect; yet here in our own very midst, under our own Constitution is a persecution reminiscent of the Dark Ages. *Credite posteri*, said Horace; and we wonder whether even our posterity will believe that such a thing occurred.

Polygamy is not *malum in se* but merely *malum prohibitum;* and when one sees the outstanding children resulting from its early Utah practice one is half inclined to say *bonus prohibitum*, for to anthropologists, and hygienists there is little doubt that it fulfills the first commandment of God in a very convincing manner. If health be the criterion, even we empiricists must admit its salutary results.

We may be cynics imbued with the spirit of Socrates and Heetley, but we must acknowledge that an astonishing number of polygamous children now shine in the highest offices of the land, whether in military, judiciary, po-

litical or business activities. Whether we be latitudinarian or devout; heterodox or orthodox, we must admit these things; and we marvel at it. To call, therefore, an expression of belief in the present practice of polygamy contrary to public morals were to deny the irrefutable findings of eugenics; and to term such an expression a public wrong were to repudiate our Constitutional freedoms. We are not herein advocating the practice of a plurality of wives, but merely admitting that so to advocate is not against public morals. Let the people decide whether they care to practice a principle so blessed by biology and eugenics; let the people listen and jail not them who so believe.

If there be a God and if the Bible be His written word, who are we to condemn that which He blessed, who are we to set up our ideas of the present and the hereafter?

Verily it is: the true religions of yesterday are the false ones today; the false religions of yesterday are the true ones now. Only they, endowed with supernatural wisdom, dare discriminate legally, in this vast land of freedom of press, speech, worship and assembly.

What right has this Court to decree that a revelation from God to Joseph Smith, the Mormon prophet, was spurious? Can this Court decide what religions are true?

The conspiracy herein alleged is merely one to worship God in accordance with the dictates of the consciences of the worshipers, and those consciences, based on both ancient and modern revelation. Revelation may seem to many of us utterly absurd, but even we doubters must accord the other man the privilege to believe; and, if he

believes, he must in our government have the paramount right to express himself and advocate his incredulous belief. To assert that Jesus was divine may shock our reason, but are we the ultimate religious credence, are we to apotheosize ourselves? Common sense tells us that each of us must judge supernatural religion in accordance with our respective experiences. The experience of these defendants is for the sanctity of the practice of their belief. Misguided they may be; but only the solemnity of the grave holds the eternal answer.

My brilliant colleague, Edwin Hatch, once called to my attention that the Lord's prayer contains these words:

> "Our Father which art in heaven hallowed be Thy name. Thy kingdom come, *Thy will be done in earth as it is in heaven* * * *"

Men have a right to believe in the law of the divine as paramount in the path of exaltation. To deny the verbal expression of their belief were to forbid them to swear allegience to their God. Practice of their belief is a matter not involved in this case.

Can the entire Christian world, venerating the Lord's prayer as the guide of its conduct and believing sincerely in the coming and establishment of the Lord's kingdom on earth, and, further, believing that they as Christians by reason of being Christians will so become or have actually become the children of Abraham (who in holiness engaged in plural marriage) and that they will become subjects as the children of Abraham in the Lord's kingdom—can they, the entire Christian world, so believe, with any degree of sincerity, and at the same time both disbelieve

and deny the right in others to discuss freely and advocate the doctrines and beliefs of Abraham? Herein the sincerity of the entire Christian world stands on trial.

But—religion is a very subtle influence. Granted; but so is the radio and the cinema. Do they unconsciously glorify crime? They at least indicate that for a time the criminal enjoys a rather charmed and luxurious existence. We hesitate, therefore, to predict what would be before us were we to start now to censor free speech that does not result in an immediate calamity of wide public distress. We say this because we are enjoined by the Constitution itself from curtailing free speech, and this Court must indulge in the gravest assumptions of authority to supersede that injunction. This Court did not make the Constitution—its function is to protect and interpret it.

By subtle inference many cheap and notorious novels of transient popular acclaim persuade towards promiscuity; but American girls do not go to the devil because such authors roseate the path. We are a people blessed with discretion and commonsense and endowed by our Creator with the power to discern good from evil. This Court cannot set itself up as a mentor for American civilization, decreeing that the people may say this and may not say that. What the people say and advocate in their religions is their business, not ours, unless they cause upheavals that threaten the government itself or emergencies of grave immediate public concern. Are we to decide that Byron's "Don Juan" must not be printed, or Boccaccio's "Decameron?" Courts are intended to punish actions, not talk. This Court is not endowed with the heavenly gift of infinite wisdom, and, therefore, it must inevitably

regret the day when it started on the long path of deciding just what people may or may not say.

As Judge Symes said (U. S. v. Barlow, 56 F. Supp.; 165 S. Ct. 25):

> "The natural reaction to reading a publication setting forth that polygamy is essential to salvation is one of repugnance, and does not tend to increase sexual desire or impure thoughts."

Nothing this Court has previously written, nothing it does now write should be interpreted to mean that it sets itself up as the arbiter of what people may say in their ordinary affairs either of worship or use of the press; it may act only to deter those extraordinary speeches that incite to riot, subversion of the government itself, or produce public emergencies of the most immediate and pressing character.

In Chaplinsky v. New Hampshire (1942), 62 S. Ct. 766, 315 U. S. 568, 86 L. Ed. 1031, wherein one of Jehovah's witnesses called a City Marshal offensive names, this Court, speaking through Mr. Justice Murphy, said:

> "There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which, has never been thought to raise any constitutional problems. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their utterance inflict injury or tend to incite an immediate breach of the peace."

There is nothing of that kind here—nothing that by common law was *ipso facto* wrong.

A match has a useful function; misused it may cause a

conflagration; and so it is with religious free speech; for in moderation it is salutary; but in immoderation it may be a conflagration of evil. Only when it produces a conflagration of evil may this Court say "desist". The conflagration in this case is not even a candle light—the attempted persuasion of one woman! Since the days of Adam men have attempted to revenge the enticement of Eve by trying to persuade woman into the path of wrong; indeed the fundamental design of the male is comprehended by every adolescent female. If the blandishments of man were all punished the species *Homo sapiens* would not only be wise but mute. When these allurements are charmed with the promise of eternal salvation, coupled with the ignominy of public scorn they are scarcely inducements after all; for who cares to flaunt the law *flagrante delicto?* An unmarried woman without a legal husband but with children always faces such a denouement. How then may we say that the advocacy of polygamy, even religious polygamy conduces her immorality? It is a weak case against the cajolery of a ruthless but transient lover.

It was the intent of the 14th Amendment to prevent encroachment by the States upon those fundamental rights of citizenship provided by the Constitution itself. It is the duty of this Court to guard against infringements of those rights. One's personal views of religion are of no consequence in this broad forum of freedom of expression; what is ridiculous, baneful to one is sacred to another. The Constitution does not give this Court the right to prefer one religion over another, even if it were so inclined.

It occurs to us that there is adequate redress against *actions* without culpating free speech. The State of Utah

may sufficiently punish unlawful cohabitation ,or polygamy, without encroachment upon the free expression of religious belief or opinion. There is, therefore, no public emergency justifying the interposition of this Court against freedom of religious expression or thought.

The opinion of the lower Court does not atttempt to base itself upon any public emergency; it makes the bald statement that it is unlawful to advocate or preach the practice of plural marriage. That is going too far, directed as it is towards free speech. If the opinion or the facts showed a grave public emergency, the decision of this Court might be otherwise; but none such is shown. The facts of practice have been punished; we may not superimpose a punishment upon the act of expression alone.

You and I meet at a Thanksgiving dinner. One of you at the dinner says: I believe polygamy should be practiced now—it is the will of the Lord, and I think that from a biological as well as religious and sociological standpoint it should be practiced now. I agree with you and think we should constantly bear our testimony to that effect. You, one of you, so declare yourself next day to Mary Gray. You are arrested, tried, found guilty and sentenced to one year's imprisonment for your talk. That is this case in a nutshell.

No immediate public emergency; no result whatsoever except the attempt on the part of one of you to convert Mary Gray! Yet for one lonely year you are to sit behind bars to think the matter over. If we have reached that point in free speech, then the halcyon isles of the equatorial Pacific look good. Let us go to Bala and forget

the nation that taught us freedom of press, religion and speech. Let us say, we are afraid of free speech, sanctified though it be.

Suppose it be argued, Utah has a statute against libel and slander, hence it may enact a statute against the advocacy of polygamy, and that, irrespective of any immediate public emergency, this case is in effect the enforcement of such a statute. That reasoning is false on several grounds: (1) Utah has no statute against *the advocacy* of polygamy; (2) libel and slander are common law crimes, because their words of themselves do immediate and often irreparable harm to some one; and (3) religious words that expound doctrine are informative and not harmful *per se*.

Again, suppose it were argued that this Court should change the word "immediate" to "eventual", and condemn those words that have a tendency to create an eventual public emergency. That obviously would be going too far; yet, since in this case there is no evidence of any immediate public danger, it is the very theory on which the prosecution apparently relies.

Suppose the prosecution were to insist that the words *spoken were an incitement* to crime; but here again we are confronted by etymology. The word incite comes from the Latin "in" plus "citare", meaning to set in rapid motion, rouse, stimulate. It means to stir up, animate, instigate, immediate action; and is not a word generically related to exposition and religious persuasion. Thus France, one of the most liberal nations of the world in the matter of free speech, condemns incitement to crime, but permits unlimited exposition of religious principles. Its

laws (1881, 1882, 1889, 1895, 1908, 1919) may, indeed have been the forerunners of this Court's present policy, that spoken words must be conducive of *immediate* public emergency and crime to be culpable. Over there they punish slander, libel, defamation and sometimes the publication of false news; but, by the law of 1905, they recognize no form of religion as a state matter and allow all religionists to have their say. I feel personally that France leads the world in its welcome of philosophical discussion; and it has many great philosophers to its credit.

Incitement does not wait for contemplation, pondering and the exercise of considered free agency; it wants results right now—indeed incitement pertains to the tumultuous crowd, to the rabble-rouser in action. Certainly it has no relation to a calm church assembly where in humility the principles of the Bible are taught with resignation and prayer.

On the other hand, to advocate a thing is to plead or raise one's voice in favor of it, to defend or recommend it publicly; to advocate is to appeal to the intellect, not to passing emotions wherein incitement has its play.

This Court therefore may well condemn words of emotional incitement that lead to immediate public emergency or crime, but certainly not words that merely persuade one to a system of religious thought.

The information filed in this case (T. 1) charged the defendants with a conspiracy to "advocate" and "practice" polygamy; but the judge said there was no evidence of "practice". (T. 48, 49, 60) and took that from the jury; so they were found guilty only of "advocacy" or "advo-

cating" against which there was no law. They were found guilty of free speech without evidence that such speech harmed anyone. All of the lower courts, as well as the prosecution, have failed to appreciate, that if the alleged conspiracy did not result in something unlawful it was no conspiracy at all; nevertheless the Supreme Court of Utah bases its decision on the bare conclusion that it is unlawful:

> "To advocate, teach, counsel, advise, and urge other persons to practice polygamy" (T. 52)

with or without any resulting public emergency, with or without any result at all. The decision goes beyond anything heretofore dared or written against free speech. It is a condemnation of abstract free speech, that is, speech separated or withdrawn from material embodiment, from material examples, practice, or particular consequences. To speak is not to do; to advocate is not to practice; to believe is not necessarily to follow; and from time immemorial this has been true especially of religious conviction. People may say their say, outside of defamation, slander and libel, until such time as they act, when adequate laws will take care of them.

If, with reference to religion, we leave out atheism, the skepticism and cynicism of Xenophanes, Socrates and Voltaire, and the agnosticism of Huxley, as not satisfying the human yearn, we are still confronted by the necessity of *unquestioning faith*, if we are to have any supernatural religion at all. It is true that this faith is sometimes buttressed by teleological arguments pointing out the design in nature; design indicates a thinker; a thinker of such magnitude and power must be God. Nevertheless, from the legal standpoint, requiring proof, materialistic mech-

anism without God is an equally acceptable explanation of the phenomenon of life. All historic religions therefore —Christianity, Hinduism, Judaism and Mohammedanism —are dependent on faith alone. This faith being unable to prove or demonstrate itself is in a Court of law an entirely inconsequential thing, except in this—it is protected by the Constitution. At this very moment no one is able to *prove* that plurality of wives is or is not essential to the highest exaltation in the kingdom of Heaven, if indeed there be such a kingdom; therefore advocates of an affirmative belief must be left alone.

For many years the writer was a member of the Society for Psychical Research of London, England, in which Lord Kelvin, Sir Oliver Lodge, and other British scientists were active participants. We investigated every presented claim—ghosts, premonitions, telepathy, telekinesis, dreams —and discovered that only premonition of death is an established phenomenon, and even this is explained as an intense telepathic communication to a synchronized recipient at the instant of physical destruction. In other words, the effort to prove supernatural phenomena by scientific methods has failed; we are therefore constrained to rely on faith and faith alone, unless we join Xenophanes of Colophon and say that all life has a natural not supernatural origin or destiny.

I have stood beneath the great lamp in the Cathedral of of Pisa, from the swinging of which Galileo discovered the isochronism of the pendulum; and have lain on the identical stone at the top of the leaning tower of Pisa from which he dropped objects to prove the first principles of dynamics, yet because of his free speech concerning his discoveries he was driven away as a heretic and forced by the

Inquisition of Rome on threat of death to denounce his theory that the earth revolved around the sun!

Verily free speech is a sacred thing! Nicolous Copernicus, before Galileo, dared to write on "The Revolutions of the Heavenly Bodies" and feared to publish it for 36 years. When he did so, he was condemned to death as a heretic.

Bruno asserted a plurality of worlds, and they burned him at the stake in Rome.

Servetus maintained that the Holy Ghost pervades all nature, for which free speech Calvin had him roasted over a slow fire at Geneva; indeed, between 1481 and 1808, over 300,000 persons were punished for holding dissenting religious views, 30,000 of them being burned at the stake. You who read your Mosheim and your Draper will know that these assertions are true.

To deny free speech now were to revert to the dark ages; for thank God we have not yet a State religion, a State ukase on what we think and say.

Nothing manifests more exquisite cruelty than creed fighting creed; sect punishing sect; and when the legal authorities use their strong arms on one side or the other, we raise the curtain to welcome the dark ages.

Can this court assert that a plurality of wives is not essential to exaltation in the celestial kingdom of God, for to do so were to apotheosize itself. What does this Court, exalted as it is, know about the hereafter? Absolutely nothing. Neither you nor I know whether Joseph Smith was a Prophet of God. Nor Jesus a Son of God.

If, therefore, we can prove no supernatural religion

whatever it be, we certainly cannot select one as contrary to supernatural probabilities.

By holding that these people are entitled to express their religious belief and advocate its present practice, this Court is not affirming polygamy but rather stating that if you so believe you may not yet practice your belief; but under the Constitution you may say your say.

The suggestion that one enter polygamy is of immediate repugnance, not only from the standpoint of aesthetics but also sociology and economy; but, biologically and Biblically considered, it is a matter of much worth. Certainly it is not detestable as was the smell of roses to Queen Ann.

A reading of the transcript convinces one of the humility, veneration and sincerity of the defendants. The story is (T. 62) that the husband of Helen Smith prevailed upon her to attend one of the meetings of the group. She did so with her husband; and at the trial she, on cross examination (T. 30-38), admitted that the stenographic report of the entire sermon she heard at that time was a true account, That sermon by Joseph W. Musser (T. 30-38) reads now more like the Sermon on The Mount than something objectionable to free speech. Yet these people are sentenced to one year in jail for speaking those words! It represents the very gist of the case—the attempt to convert Helen Smith. She went there of her own accord (T. 62) and learned that we are all blessed with free agency, even when it comes to obeying the commandments of the Lord as revealed through a modern Prophet. Furthermore the cross examination of the witness Cosgrove (T. 18-28) is a resume of the various Christian

doctrines these people taught. Both of these women were prosecution witnesses; and in their testimony the Court gets a complete story of what these people did Indeed the persecution of these people reminds one of the tiny underground churches in the Catacombs along the Via Appia at Rome, of people who were either burned as street torches or thrown to the lions of the Colliseum if they insisted that they believed.

The story of the Smith woman—of conversations she had with her *then* husband—was inadmissable from the very beginning; nevertheless that story seemed to control the opinions below notwithstanding, that even to consider the talks between husband and wife was error. It is a very weak cricket—stridulation attempted to be enlarged into a magnivox of immediate general public emergency. It is as if the prosecution adopted the saying of the fly on the Roman chariot wheel: "My, what a dust I make!"

When we come to discuss what speech is *contra bonos mores*, we have a heavy undertaking.

In Thomas v. Collins (Texas, 1945), 65 S. Ct. 315, 323 U. S. 516, 89 L. Ed, 430, wherein the defendant solicited labor union members but had no labor organizer card this Court, speaking through Mr. Justice Rutledge, said:

> "The case confronts us again with the duty our system places on this Court to say where the individual's freedom and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensible democratic freedoms secured by the First Amendment * * * That

priority gives these liberties a sanctity and a sanction not permitting dubious intrusions * * *. For these reasons any attempt to restrict those liberties must be justified by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice.

"These rights rest on firmer foundations. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. *Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.* It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly.

"But in our system where the line can constitutionally be placed presents a question this Court cannot escape * * *. And the answer under that tradition can be affirmative to support an intrusion upon that domain *only if grave and impending public danger requires this* * * *. The statements forbidden were not in themselves unlawful, had no tendency to incite to unlawful action, involved no element of clear and present, grave and immediate danger to the public welfare. Moreover the State has shown no justification for placing restrictions on the use of the word 'solicit'. We have here nothing comparable to the case where use of the word 'fire' in a crowded theatre creates a clear and present danger.

"* * * History has not been without periods when the search for knowledge alone was banned. Of this we may assume the men who wrote the Bill of Rights

were aware. But the protection they sought was not solely for persons in intellectual pursuits. It extends to more than abstract discussion unrelated to action. The First Amendment is a charter for government.

* * *

"It is from petty tyrannies that large ones take root and grow. This fact can be no more plain than when they are imposed on the most basic rights of all. Seedlings planted in that soil grow great, and, growing, break down the foundations of liberty."

Mr. Justice Jackson, concurring, said:

"But it cannot be the duty because it is not the right of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardiansip of the public mind through regulation of the press, speech and religion. In this field everyone must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us * * *. or would I. Very many are the interests which the State may protect against the practice of an occupation, very few are those it may assume to protect against the practice of propagandizing by speech or press. These are thereby left great range of freedom.

"This liberty was not protected because the forefathers expected its use would always be agreeable to those in authority or that its exercise always would be wise, temperate, or useful to society. As I read their intentions, this liberty was protected because they knew of no other way by which free men could conduct representative democracy."

It is most respectfully submitted, therefore, that the conviction in this case violates provisions of the Constitu-

tion of the United States that are binding on the respective States, and hence should be reversed.

CLAUDE T. BARNES
Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES

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No. 60

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SUPPLEMENTAL BRIEF OF APPELLANTS

CLAUDE T. BARNES,
Counsel for Appellants.

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To the Honorables, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

With deep humility counsel accepts the suggestions Mr. Justice Jackson made at the oral argument of this case, to the effect that the Utah statute behind this prosecution is so broad as to condemn almost every human action

hence the defendants could not have known of a law prohibiting that which they are alleged to have done. Incidentally it is noted with admiration and respect, how this highest Court of the land is as solicitous of the Constitutional rights of the lowly and the down-trodden as of the mighty and strong, and how it takes it upon itself to see that justice is done. Counsel, therefore, formally moves the reversal of the judgment in this case on the ground that the section of the Utah statute on which it is based is repugnant to the Constitution of the United States; and if such motion be granted, it appears to him, that a decision of the other points involved will not be necessary.

1.

Although the information in this case is admittedly drawn alone on Section 5, we set forth the Utah conspiracy statute (Sec. 103-11-1, Utah Code 1943) in its entirety:

"103-11-1. Criminal Conspiracy Defined. If two or more persons conspire:

(1) To commit a crime; or

(2) Falsely and maliciously to indict or convict another for any crime, or to procure another to be charged or arrested for any crime; or,

(3) Falsely to move or maintain any suit, action or proceeding; or,

(4) To cheat and defraud any person of any property by any means which are in themselves criminal, or by any means which if executed would amount to a cheat, or to the obtaining of money or property by false pretenses; or,

(5) *To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice or the due ad-*

> *ministration of the laws;*—they are punishable by imprisonment in the county jail not exceeding one year, or by a fine not exceeding $1000."

We have italicized the subsection on which this information is founded, as admitted (Resp. Brief, p. 4) herein.

The information (Trans. of Record, 1) was based on the alleged fact that the defendants conspired "to commit acts injurious to public morals" hence its constitutionality must rest entirely on section 5, which, thusly reduced becomes the following:

> "If two or more persons conspire: . . . (5) To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or the due administration of the laws;—they are punishable", etc.

Bear in mind there was no evidence in this case of the commission of any crime known to the law, as a result of the alleged conspiracy; the judge took all such from the consideration of the jury (Trans. of R., p. 7), and all that remained was whether the advocacy of plural marriage as a religious doctrine is "injurious to public morals", and itself a crime.

Prior to their arrest therefore the defendants had only the vague law cited supra concerning "any act" injurious to the public health, to public morals" to guide them in what they might say. There is no law in Utah against the advocacy of plural marriage as a religious doctrine.

When Mr. Justice Jackson spoke his query, it occurred to the writer that, the particular brand of cigars the au-

thor smokes makes him husky before the Supreme Court, anything that husks a man must be injurious to his health, hence under the statute the two people in Utah who conspired to give the writer a box of cigars before he left for Washington should be sent to jail for a year each. In the same line of reasoning, in the Pullman where much of this is pondered, the waiters of the dining car who conspire to prevail upon the writer to eat three heavy meals a day are committing an act injurious to his health, hence, they should serve a year's time for so doing. It all by such a *reductio ad absurdum* illustrates how meaningless and absurd the Utah statute is, when it prohibits *any* act against health and morals Such a statute—that section—should not exist in the law books of any state, for it makes the daily acts of ordinary people amenable to the whims of prosecuting attorneys.

In Washington, D. C., I notice on public busses a sign that reads:

"It's the law—do not stand in front of the white line."

Everyone knows what the white line is.

Suppose on entering Utah travelers were confronted by a sign:

"It's the law—do not do any act injurious to public health, morals, trade, commerce."

The tourist would say: "Let's turn back", and he would least expect that the thing might apply to his very words!

It amounts in effect to a sign reading:

"It's the law—do not do any act."

Even a child would inquire: "What?".

The word "any" means (Standard Dict.): "One indefinitely and indifferently". In laws we often come upon the words, "Any person", because laws are applicable to all the people alike; but when the word "any" is used as a modifier of the word "act" the word "act" is so infinitely various in its application that it becomes meaningless and incongruous.

I may say that when a year ago I argued "White Slave Act" cases before this Court (Cleveland v. U. S., 67 S. Ct. 13), I was greatly concerned with the words "any other immoral purpose"; but in those cases there were preceding words through which the doctrine of *ejusdem generis* could be invoked. There is no such here. Section 5 of the Utah law herein considered is supposed of itself to give another or separate definition of conspiracy, and it has no relation to the other sections on obtaining money by false pretenses or the like. *Ejusdem generis*, therefore, is inapplicable, and I bring it up only because I am trying to anticipate anything that might occur to one defending this clearly unconstitutional statute.

Suppose it be argued, that in the interpretation of a criminal statute one is supposed to use common sense and deduce by his own reasoning precisely what the legislature intended. That does not aid us here, for even lawyers, who in their highest expression exemplify reasoning more than the mere recital of precedent, would hardly conclude that the words under consideration had any application to free speech.

Again, suppose it be contended, that everyone knows what is "any act injurious to public morals", I am re-

minded of the Latin phrase—*ignotum per ignotius*, which I believe refers to a thing unknown by a thing more unknown. If "any act" be beyond our comprehension as defining the culpable certainly the words "public morals" are beyond my power of definition. I argued this point *in extenso* in my briefs in the Cleveland cases (*sit supra*), and where ethical philosophers disagree certainly a mere legist like myself fears to tread. Hence if opposing counsel were to argue that the ordinary citizen would know what the Utah statute attempts to condemn, and precisely condemn, let us say, then I must remonstrate in behalf of us ordinary humans.

2.

Let us transport the foregoing to a precise holding, again, let us say, with sincere acknowledgment of the prompting of this Court. In the important, controlling case of United States v. L. Cohen Grocery Co. (1921), 255 U. S. 81, the point was, whether the provisions of the Lever Act (Food Control Act) were so broad and uncertain as to be repugnant to the Fifth and Sixth Amendments requiring due process and information of the nature and origin of an accusation.

The Lever Act used the word "any" very freely in making it unlawful for "any" person to destroy "any" necessaries; to commit waste of "any" necessaries; "to engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" and so on, or to conspire with others to do so. The Cohen Co. sold sugar in St. Louis at what was alleged to be a rate in violation of the statute. A

demurrer was successful below and the government took a direct appeal to the Supreme Court of the United States. The lower court had said:

> "the law vague, indefinite and uncertain, and because it fixes no immuntable standard of guilt, but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it, and because it does not inform defendant of the nature and cause of the accusation against it, I think it is constitutionally invalid, and that the demurrer offered by the defendant ought to be sustained."

Mr. Chief Justice White delivered the opinion of this highest Court, saying in part:

> "The mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth and Sixth Amendments as to questions such as we are here passing on." . . . "The sole remaining inquiry, therefore, is the certainty or uncertainty, of the text in question, that is, whether the words 'That it is hereby made unlawful for any person wilfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries' constituted a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion, so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject matter of investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open,

therefore, the widest conceivable inquiry, the scope of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. And that this is not a mere abstraction finds abundant demonstration in the cases now before us." . . .

I ask the court merely to reread the foregoing sentence by sentence, with the wording of the Utah statute in mind —"any act injurious to the public health, to public morals". The answer must be irrefutable.

That the foregoing is generally accepted law is apparent from the following two paragraphs from Sutherland:

"Since the state makes the laws, they should be most strictly construed against it; to establish a certain rule under which mankind may be safe from the arbitrary discretion of the judge; that it is reasonable for penal statutes to be construed so that they will be required to give 'fair warning' of what the law intends to do if a certain line is passed."

Sutherland, "Statutory Construction", Vol. 3, § 5604 (3rd Ed.)

"The words of the criminal statute must be such as to leave no reasonable doubt as to the intention of the legislature, and where such doubt exists the liberty of the citizens is favored."

Sutherland (*cit. loc.*) § 5605.

3.

Nothwithstanding the suggestion of the Court herein I am now constrained to launch an inquiry into whether or not my clients are entitled to take advantage of its beneficence; and the first wave encountered is the applicability to the states of the right to be informed, of the nature of an accusation against oneself. The Cohen case above detailed involved the interpretation of a Federal statute in a Federal Court, resulting in a direct appeal by the government to this lofty tribunal. The case at hand involves a state statute with an appeal from the highest Court of that state to the same ultimate judiciary.

Let us assume, that by the Fay Foster and Adamson cases (all recently reported in Vol. 67 S. Ct. Reporter) the cherished hopes of many of us, that all of the first eight amendments were carried over into the Fourteenth, have been denied. Where does that leave me floating as counsel for these bestricken men?

Here and there a log of refuge appears:

Mr. Justice Jackson (Fay case, 67 S. Ct. 1613):

> The Fourteenth Amendment "prohibits prejudicial disparities before the law." It is "the function of this federal court under the Fourteenth Amendment . . . to protect the integrity of the trial process by whatever method the state sees fit to employ."

Mr. Justice Reed (Adamson v. People, 67 S. Ct. 1672):

> "A right to a fair trial is a right admittedly protected by the due process clause of the Fourteenth Amendment."

Mr. Justice Frankfurter (Adamson *cit. supra*):

> "Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."
>
> (In Foster v. People, 67 S. Ct., 1716) "The 'due process of law' which the Fourteenth Amendment exacts from the States is a conception of fundamental justice . . . It is not satisfied by merely formal procedural correctness, nor is it confined by any absolute rule. . . . But process of law in order to be 'due' does require that a state give a defendant ample opportunity to meet an accusation."

En passant I might ask Mr. Justice Frankfurter how a defendant can "meet an accusation" when the statute on which it is founded cannot lead an intelligent man to foreknow that he might be so charged; but—I must not assume that he with whom I have often crossed oars is not on this occasion actually coming to my rescue.

Again Mr. Justice Frankfurter in Foster (*cit supra*):

> The Fourteenth Amendment guards against: "An ingredient of unfairness", "a deprivation of rights essential to a fair hearing", the "miscarriage of Justice", and protects "rights essential to a fair hearing."

Not to be informed of the origin of an accusation and of the fundamental law upon which it is based is a de-

nial of not only due process but also the basic constitutional conceptions of our government.

To illustrate as best I may *extempore* and in the fleeting hours of a passage home:

A state enacts a law to the effect that "it is unlawful to commit Blank". The judge and jury are left to determine what Blank is. Again: "it is unlawful for two or more persons to conspire to commit Blank." You ask, so do I, what in the world is Blank, likewise these defendants ask what is "any act against public health or morals?" We therefore must admit, that to convict one of Blank is to deny him the protection of the very government under which he was born.

Consonant with the foregoing this Court said in Buchalter v. New York (1943), 319 U. S. 427:

> "The due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land.'"

It is our opinion, written as it were *in transitu*, that one of the most "fundamental principles of liberty and justice" is, that laws shall clearly define that which is wrong; otherwise we are to become victims of judicial caprice, if, indeed, not also political or sectarian revenge.

4.

The final obstruction ahead of our rescued boat is the query: Have defendants waived the point by not arguing

it? We are convinced, however, that in a criminal case with an unconstitutionality as patent as this one the Court *sua sponte* may not only raise the question but act upon it at any stage of the proceedings. These are not the only defendants who might be enmeshed by the Utah conspiracy law with its infinite capabilities of distressing and humiliating innocent people. Goodness knows what an ardent county attorney and an equally misguided judge might determine to be an act against public health or morals. As shown in the footnote of the Cohen case *supra* numerous courts attempted in *extremis* to justify the word "any" and determine a workable criterian therefrom; but without success. If learned Federal judges could not make sense of the word "any" neither can we here.

The defendants herein filed not only a motion to quash in the nature of a general demurrer (Tran. of R., p. 3), but also a motion to dismiss (Tr. R., p. 4), based on the First and the Fourteenth Amendments to the Constitution of the United States.

I believe this to be a statement of what the law either is or ought to be: (a) Unlike civil rules and regulations criminal laws and their interpretation are of intense interest to citizens of the United States generally; (b) the courts should be the constant guardians of the rights of the people; (c) if a criminal law be a nullity by reason of its obvious unconstitutionality counsel for defendants jeopardized under that law may not be permitted to waive its unconstitutionality for the reason that precedents though erroneous take dangerous hold and the public should not be afflicted by one man's waiver of their obvious right; (d) in criminal cases, therefore, it is not only

the privilege of courts but also their duty to indicate unconstitutionality, not, let us say, for the particular defendants, but for the public (e) unconstitutionality, which is the equivalent of nullity, may be suggested in criminal cases at any time, even by way of final gasp in a petition for rehearing.

Since this is the first brief counsel has written in reliance almost entirely on his conception of the basic philosophy of the law it is not weighted with precedents; but he did have time to glimpse the following:

> "In criminal cases the doctrine that a constitutional privilege may be waived must be true to a very limited extent only. A party may consent to waive rights of property, but the trial and punishment for public offenses are not within the provinces of individual consent or agreement."
>
> Cooley's "Constitutional Limitations", (8th Ed.), Vol. 1, p. 371.

The following note occurs on the same page:

> "When a case involves the punishment of a defendant for a crime, the constitutionality of the statute authorizing the prosecution may be questioned at any stage of the proceedings. Com. v. Hana, 195 Mass. 262, 81 N. E. 149, 122 Am. St. Rep. 251, 11 L. R. A. (N. S.) 799, 11 Ann. Cas. 514; Ex parte Lewis, 45 Tex. Crim. Rep. 1, 73 S. W. 811, 108 Am. St. Rep. 929."
>
> "A constitutional objection to a criminal statute may be raised on a petition for a rehearing, even though it had not been raised either upon the trial or upon the original appeal. State v. Bickford, 28 N. D. 36, 147 N. W. 407, Ann. Cas. 1916 D. 140."

Since these adumbrations will be air-mailed en route and printed without proof-reading, counsel hopes that the Court will be tolerant of any deficiencies that might eventually appear; nevertheless, awkward though his presentation be, he is convinced that this case must be reversed on the belated point of unconstitutionality alone. Experience is a great teacher, but it is not always free from abasement.

Respectfully submitted,

CLAUDE T. BARNES,
Counsel for Appellants.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1947

No. 60

JOSEPH WHITE MUSSER, GUY H. MUSSER, CHARLES FREDERICK ZITTING, ET AL.,

Appellants

vs.

THE STATE OF UTAH,

Respondents

Appeal From the Supreme Court of the State of Utah

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

To the Honorables, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This appeal is taken from a decision of the Supreme Court of the State of Utah upholding a finding of the District Court of the Third Judicial District in and for Salt Lake County, state of Utah that the defendants herein were guilty of violation of Section 103-11-1 Utah Code Annotated 1943. The information in this case which was filed in the District Court on April 21, 1944, charges:

"That the said above named defendants, on and between the 1st day of June, 1935 and the 1st day of March, 1944, at the County of Salt Lake, state of Utah, did willfully and unlawfully agree, combine, conspire, confederate and engage to and with and among themselves and to and with divers other persons to your affiant unknown, to commit acts injurious to public morals as follows, to wit:

"That the said above named defendants at the time and place aforesaid did wilfully and unlawfully agree, combine, conspire, confederate and engage to and with among themselves and to and with divers other persons to the District Attorney unknown to advocate, promote, encourage, urge, teach, counsel, advise and practice, polygamous or plural marriage and to advocate, promote, encourage, urge, counsel, advise and practice the cohabiting of one male person with more than one woman and in furtherance and pursuance of said conspiracy and to effect the object thereof did commit the following overt acts: * * * ".

There follows a description of twelve separate and distinct overt acts relied upon by the state as a basis for the conspiracy charge.

Section 103-11-1, Utah Code Annotated, 1943, provides so far as pertinent to this case:

"If two or more persons conspire (1) to commit a crime or * * * (5) to commit any act injurious to the public health, the public morals or to trade or commerce or for the perversion or obstruction of justice or the due administration of the laws;—they are punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding $1,000."

The evidence presented in the trial court established beyond a reasonable doubt that the defendants named in this action organized themselves together for the purpose of advocating, pro-

moting and encouraging the practice of polygamy and in furtherance of the common purpose that they purchased a house in Salt Lake City at which meetings were held. At these meetings speeches were made by various of the defendants, advocating not merely a belief in polygamy but a present practice of polygamy. Evidence also shows that these individuals in pursuance of their conspiracy published a newspaper known as "Truth," which newspaper likewise advocated not merely a belief in polygamy but a present practice of polygamy. The evidence also indicates that the defendants in this attempted to convert certain individuals to believe in and to practice polygamy at the present time.

The appellants have made fourteen assignments of error but in their brief they have narrowed the assignments of error down to three principal points. For convenience the state will answer these points in the order in which they were raised by the appellants in their brief. Evidence in the case as it appeared in the record will be more fully discussed as each point raised by the appellants is hereafter covered in the state's brief.

THE JURY SELECTION

The first argument made by the defendants in this case was that the manner in which the Jury was selected was an infringement of their rights under the Constitution of the United States. Counsel for the defense assigns not only certain specific questions and answers of prospective jurors touching their qualifications as a basis for the contention that the defendants were not granted a fair trial, but he also cites the general background of the case. The trial was held in a community of which almost half of the residents are members of the Church of Jesus Christ of Latter-day Saints, commonly known as the Mormon Church, and as might be

expected the jury panel contained a number of members of the Mormon Church. Counsel for the defendants then alleges, without an iota of evidence to back his contention, that all members of the Mormon Church are so biased against the defendants in this case that a Mormon would not be able to sit on the jury and give them a fair trial. As a matter of fact it can be seen from reading the record that if any prejudice existed against the defendants in the minds of the Mormon members of the jury panel, it was instilled by defense counsel themselves by their tactics during the jury selection.

In questioning prospective jurors the court allowed counsel for the defense to ask questions directly of these prospective jurors. This goes far beyond the privileges ordinarily accorded defendants in criminal cases within the state of Utah where the established practice is for the court to question the jurors and for the respective counsel to submit questions that they may wish to put, through the Court. In placing questions directly to members of the jury panel, counsel for the defense pointed out that members of the Mormon Church who were guilty of polygamy were immediately excommunicated, and then questioned each individual juror who happened to be a Mormon as to whether or not this attitude on the part of the Church would affect his attitude toward the case. It appears to have been a deliberate design on the part of the defense counsel to attempt to create on the part of the jurors they examined a prejudice which could later be assigned as a basis for their contention that the defendants did not receive a fair trial.

Following are typical questions and answers taken from the record on the examination of prospective members of the jury:

"Q. You understand this group of defendants have been excommunicated from the Church?

"A. I heard you say so this morning. I didn't know definitely."

"Q. Do you know that before anyone is excommunicated they are called up before a certain forum of the Church for examination and given a right to defend themselves?

"A. I didn't know the procedure until I heard you this morning.

"Q. Knowing the fact that they have been tried before the Church and have been adjudged guilty of teaching, preaching or practicing polygamy, would the fact that they have been found guilty of such a charge by the Church weigh in your determinaiton of their guilt or innocence?

"A. Well, after coming here, we received instructions from the Court and after listening to those instructions I thought it was my duty to judge them upon the evidence given.

"THE COURT: Is there evidence here? Mr. Roberts, the rules of evidence apply to these proceedings. There is no evidence here these people were excommunicated.

"MR. ROBERTS (District Attorney): That is very true.

"THE COURT: There is no evidence here that they were excommunicated because of the practice of polygamy or teaching polygamy or unlawful cohabitation or anything else.

"MR. PATTERSON: Now, your Honor, that is the very thing I asked about in the first instance. We want to make a record here to show they have been excommunicated. That was what I was talking about yesterday and today and of course I didn't know now we were going to be permitted to make this examination. And you are entirely right. We must supply that record

and we will make that record and will do so from a book I have here." (Trans. 676 to 682)

The situation is much the same as if an attorney defending an accused criminal were to state to prospective jurors that his client had previously been convicted of many felonies, and then to allege that the fact that the jurors were acquainted with the record of his client would prevent them from being impartial. Certainly an attorney should not be allowed to create a situation in the minds of the jurors which may tend to create prejudice and then complain of such prejudice as a basis for disqualifying the jurors. Counsel for the state recognizes that it has gone outside of the record as set forth in the transcript in making the foregoing argument. However, counsel for appellants has also gone outside the record either in the transcript or the record in its entirety in seeking to imply general bias to members of the Mormon Church. It was therefore the feeling of state counsel that the court should understand the full background that existed in the case at the time of the questioning of the prospective jurors in order that it might properly be able to weigh the argument of counsel.

Let us turn, however, from these general contentions made by the defense counsel to the specific assignments which they make with regard to certain designated jurors. A great number of jurors were examined in this case and many of them were rejected for cause. Some of the defendants' objections for cause, however, were denied by the court, and the denial of the objections to four of the prospective jurors is now assigned as a basis for the contention that the defendants did not receive a fair trial. Each of four jurors, McDonald, Hollingshead, Decker and Arnold, stated that he had formed an opinion regarding the merits of the case. Each of them, however, stated on examination by the court

that it was not such an opinion as would prevent him from giving the defendants a fair and impartial trial and rendering a verdict in accordance with evidence as presented during the hearing.

Counsel for the appellants has taken issue with the majority of the opinions of this Court in three recent cases: Fay vs. People of New York, 67 Sup. Ct. 1613; Adamson vs. People of California, 67 Sup. Ct. 1672; and Foster vs. People of the State of Illinois, 67 Sup. Ct. 1716.

Counsel for the state believe that so far as the decision of the instant case is concerned, it is immaterial whether the majority or the minority opinions of the court in those cases is followed.

Even though the Fourteenth Amendment does not place upon the states the restrictions of the Sixth Amendment to the Constitution of the United States, counsel recognizes the wisdom and justice of the words of Mr. Justice Reed in the Adamson case to the effect that "a right to a fair trial is a right admittedly protected by the due process clause of the Fourteenth Amendment." The evidence in this case establishes that the defendants were given a fair trial. On the other hand, if the opinion of the minority of this Court were to be followed to the effect that the provisions of the Sixth Amendment are guaranteed against infringement by states, these defendants have still been accorded "the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed."

The defendants were granted a jury trial. The trial was held in the state and district wherein the crime was committed. The only question that can be raised, is whether or not the jury was

impartial or, if we are to follow the majority of the opinion of the Court in the three cases above cited, whether or not the defendants had a fair trial. The chief basis for the allegations of he defendants, that they did not receive a fair trial or a trial by an impartial jury, is that four of the prospective jurors stated that they had formed an opinion on the case that it would require evidence to remove. As stated above, however, each of them said that he could give the defendants a fair and impartial trial and that he would decide the case on the basis of the evidence presented. The defendants claim that wherever a juror has such an opinion that it would take evidence to remove the opinion, he is unqualified to sit as a juror in such a case. This contention was raised both in the trial court and in the hearing before the Supreme Court of the State of Utah. The trial court definitely stated that such was not the law in the courts of the state of Utah, and indeed he stated so on good authority.

There are some cases which hold that if a juror has formed an opinion which it will require evidence to remove, he is unqualified to sit as a juror. Recent cases, however, have recognized the fact that human nature is such that a person will form some opinion or impression from any information that he may gain about a case regardless of how unreliable such information may be. Once this opinion or impression is gained it will remain with the individual until some evidence removes it. Therefore, for a juror to state that he has formed an opinion but that it will not require evidence to remove such an opinion is for the juror to state something that is entirely contrary to human experience. The decided trend of recent cases is to the effect that although a juror has formed an opinion such as it will require evidence to remove, he is not unqualified to sit in the case, if in fact his opinion is of such a nature that it will yield to the evidence presented in the case

so that he will be able to give the defendants a fair and impartial trial on the basis of the evidence presented at the trial. The general rule on this point is concisely stated in 50 Corpus Juris Secundum 986 as follows:

> "It has been held that a juror is incompetent if he has formed an opinion which it will require evidence to remove, notwithstanding he states that he can disregard the opinion so formed and render an impartial verdict. On the other hand, it has also been held that the mere fact that a juror has an opinion which it will require some evidence to remove furnishes no certain or proper test of his competency and is not of itself sufficient to disqualify him, since it must necessarily be true in every case where any opinion or impression is formed that some evidence will be required to remove it."

The defense quotes extensively from the old Utah case of Conway vs. Clinton, 1 Utah 215, which held that a juror is disqualified if he states that the opinion he has formed of the case is an unqualified opinion, even though he states that it was not such a strong opinion that it would not yield to the evidence. This case seems to turn upon the phrase "unqualified opinion." The Utah Statutes make ineligible a juror who has an "unqualified opinion" and the case of Conway vs. Clinton stuck closely to the letter of the statute and held that a person who stated that he had an "unqualified opinion" was ineligible. Shortly after Conway vs. Clinton was decided, however, the Supreme Court of the State of Utah decided the case of People vs. O'Laughlin, 3 Utah 133, which establishes the law which is still followed by the courts of the state of Utah. The language of the Court in this case is as follows:

> "The error first alleged is the overruling of the challenge on the part of the defendants, of John Lowder, one of the

jurors, who upon his voir dire said he had heard a report of the facts of the case, from which he had formed an opinion, which he believed to be true, but he did not know that he had ever expressed it; that it would take evidence to overcome such belief; 'I believe it like other reports I hear;' that it was a conditional and not an unconditional opinion; the condition was as to the truth of the story he had heard; 'it was unconditional if the report was true'; when 'I heard the story, I believed there was something in it, of course,' and the conditions about it were, 'in case the transaction did really take place,' that he would require proof in the case before he would be willing to act. That he had no opinion, bias, or prejudice, or belief as to the guilt or innocence of either of the defendants, that would prevent him from acting impartially as a juryman. The challenge was made under the statutory provision disqualifying a juror who has 'formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offense charged.'

"We are of the opinion that there was no error in overruling the challenge. The condition of this juror's mind was such as would usually or naturally be formed by any person, upon hearing a report of an alleged commission of crime. He had heard a story; he believed it; he says, 'I believed there was something in it, of course.' 'Nobody disputed it; I believed it like other reports I hear.' It is obvious that this opinion or belief was liable to be changed by the statements of the next person he might meet; this is not a conviction of the mind, a fixed conclusion, 'an unqualified opinion or belief.'

"Impressions, or qualified or conditional opinions, formed upon the mere hearing of a report, which, in the mind of an honest man capable of acting as a juror, easily yield to the testimony of witnesses under the sanction of an oath, having personal knowledge of the facts, constitute no objection to a juror; but an unqualified opinion or belief which

closes the mind against the testimony presented in opposition to it, resists its force, and perverts the judgment, does constitute a good and valid objection; an unqualified opinion or belief is fixed and certain, and is incompatible with reasonable doubt and uncertainty, and is not dependent upon the existence or non-existence of any extrinsic fact. The defendants were entitled to a trial by an impartial jury. This provision of our statute is a simplification of the common law, and the opinions of the state courts, where no statute exists, or where the same or similar statutes are in force, are authority with us in applying the facts in this case to the law, and deducing conclusions. The question at issue is, do the statements of the juror upon his voir dire show him to have had, at the time, an unqualified opinion or belief as to the guilt or innocence of the defendant? In Commonwealth vs. Webster, 5 Cush. 297, Shaw, C. J., said: 'The opinion or judgment must be something more than a vague impression formed from casual conversations with others, or from reading abbreviated newspaper reports. It must be such an opinion upon the merits of the question as would be likely to bias or prevent a candid judgment from a full hearing of the evidence.' This is clearly the law: State v. Wilson, 38 Conn. 126; Curley v. Commonwealth, 84 Pa. St. 151; Staup v. Commonwealth, 74 Id. 458; People v. Reynolds, 16 Cal. 128; Gardner v. People, 3 Scam. 83. In closely balanced cases the appearance of the juror, the manner in which he is examined by the counsel, and its effect upon him, sometimes justly have great weight with the trial judge. In view of this, the court in Ortwein v. Commonwealth, 76 Pa. St. 414, said: 'Much weight, therefore, is to be given to the judgment of the court below, in whose presence the juror appears, and by whom his manner and conduct, as well as his language, are scrutinized.' "

There was in this case no exclusion of jurors on account of color, race, or creed. The jury was taken from the regular jury panel of the district court of the Third Judicial District. It was not a blue

ribbon or a hand-picked jury. It was a fair and impartial jury which could and did give the defendants a fair trial. In passing upon this same assignment of error, the Supreme Court of the State of Utah stated at 175 Pac. (2d) 724, pages 739 to 740:

> "As noted above, the exception taken to the propounded questions of the court was to the effect that if a juror had an opinion which it would take evidence to remove, then he could not be an impartial juror since he could not accord to the defendants and each of them the presumption of innocence. Standing alone, the questions set out hereinabove might be construed by the jurors addressed, and the others present who heard the questions, to mean that the jurors might carry with them to the jury room the opinion formed prior to trial and, unless that opinion was changed by the evidence, return a verdict in conformance therewith. It should not be necessary to say that this is, of course, not the law.
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> However, at the outset of the examination of the jury, the court instructed all of the prospective jurors that those chosen to serve must determine the facts in accordance with the evidence produced in court; that their verdict should be based solely upon that and nothing else. He pointed out specifically that each defendant was clothed with the presumption of innocence and that unless that presumption was overcome by evidence produced in court which proved the guilt of the defendants beyond a reasonable doubt, they were entitled to an acquittal. In such initial discourse to the jury, the following statement by the court was made: "The mere fact that you have read about this case in the newspapers or that you have discussed it with others or heard it discussed by others, or that you have formed or expressed an opinion based solely upon newspaper accounts of the case or gossip or common notoriety, those things in and of themselves do not disqualify you as serving as jurors on the case if you can in spite of that and nevertheless be fair and

impartial, put to one side any opinion that you have ever formed based upon the sources that I have indicated.' As to the jurors examined and not excused for cause upon challenge, each had indicated that any opinion that he had formed or expressed was based upon newspaper articles, common notoriety and gossip and that none of them had any direct information with respect to the facts in the case. Of numerous jurors the question was asked as to whether that juror could lay aside his opinion and consider the case on the evidence presented in court and finally render a fair and impartial verdict based solely upon such evidence. Just prior to the exercise of peremptory challenges, the court again called attention to the presumption of innocence that attended eac hdefendant and asked generally of the panel as to whether there was any one present on the jury who would not be willing to accord each defendant the presumption of innocence until their guilt was proved beyond a reasonable doubt."

If prospective jurors with opinions such as these are to be excluded from a jury panel, it would be practically impossible to secure a jury in any case which has been given publicity by newspapers. The Constitution and Statutes of the State of Utah are as strict in preserving the rights of the defendant in this regard as are the requirements of either the Fourteenth Amendment or the Sixth Amendment to the Constitution of the United States of America. The Supreme Court of the State of Utah, as guardian of the rights under the Constitution of the State of Utah and the Statutes of the State of Utah, has determined that the defendants in this case received a fair and impartial trial by a fair and impartial jury. There is nothing in the evidence of the case to indicate otherwise.

WOMAN TESTIFYING AGAINST HER HUSBAND

Although there is no assignment of error to support this point, the second argument presented by counsel for the appellants in their brief is that it is a denial of constitutional rights for a court to permit a wife to testify against her husband in a proceeding in which the action against him and others is as to him only deferred and not dismissed. In support of this contention counsel quotes from Section 104-49-3 Utah Code Annotated 1943 which provides that in certain cases a husband or wife cannot without the consent of the other testify against the other. This point arises in this case by reason of the fact that the witness, Helen Smith, was the wife of one of the defendants in the case. However, the husband of Helen Smith was not on trial but rather the action was severed as to him. It was not, however, dismissed.

Counsel for the state have difficulty in seeing just how the appellants maintain that there is a federal question involved in this argument. Certainly, whether or not the Statutes of the State of Utah have been violated was for the Supreme Court of the State of Utah and not for the Supreme Court of the United States to determine. His argument that the permitting of Mrs. Smith to testify in this case is a violation of the Fourteenth Amendment to the Constitution of the United States is at best rather obscure.

So far as counsel for the state are able to determine, appellants' argument is that at common law a woman could not testify against her husband and that therefore this right is protected and preserved by the Constitution of the United States. There is no specific prohibition against testimony of a woman against her husband or a husband against his wife in any of the first ten

amendments. Therefore, if it is to receive the protection of the United States Constitution at all it must be done by the Fourteenth Amendment. It is true that such was the rule at common law and it is also true that such is the rule by statute in the majority of our states at the present time. However, it certainly could not be contended by counsel for appellants that the Fourteenth Amendment preserves inviolate, all of the complex procedures of the common law. If this were true, most of the codifications of our states so far as they relate to criminal pleading and practice would be unconstitutional as being contrary to due process of law. It certainly was not the intent of the due process of law amendment to the Constitution of the United States to freeze in the state in which they existed at the time of the adoption of such amendment all rules of pleading and practice which may have theretofore existed under the common law or by the statutes of the various states. Appellants cite not a single case or authority of any kind to sustain their position that a federal question is raised by this argument.

Let us apply the test of the Fourteenth Amendment to the Constitution of the United States to this purported assignment of error. Is there anything that strikes the conscience as unfair about permitting a woman to testify against the fellow conspirators of her husband in a case where her husband is not even on trial? Indeed, if a woman were so prohibited from testifying, it would be because of an extremely technical and narrow application of a rule of evidence, and not because of anything inherently unfair or unjust in such a procedure.

Furthermore, this question was not raised in the trial court at the time that this evidence was offered As was pointed out by the

Supreme Court of the State of Utah in the opinion from which this appeal was taken:

> "Furthermore the question presented by the assignment of error was not presented to the court below. The only objection interposed below to the testimony of Helen Smith relative to these conversations with Heber C. Smith, Jr., was that it was incompetent, irrelevant, immaterial and hearsay. No objection based on communications between husband and wife was made. An objection to testimony on the ground of privileges was not properly made when based on the ground that it is incompetent. Profit vs. United States, 9th Circuit, 264 Fed. 299: Underhill's Criminal Evidence, 4th Ed., page 682."

FREEDOM OF SPEECH, PRESS, RELIGION AND ASSEMBLY

By rhetoric which almost becomes poetical, counsel for appellans devotes most of his brief to an argument which is not at issue in this case at all and which never was at issue. That people have the constitutional right to express beliefs with regard to the hereafter, including the subject of plural marriage as the means to the "highest salvation," we do not dispute. The State of Utah is not and has not been concerned with any expression of beliefs concerning the hereafter, whether related to marriage or any other subject. The State has enacted statutes which prohibit polygamy and unlawful cohabitation. These statutes relate only to practices within this life, within the boundaries of the State of Utah. Likewise, the criminal conspiracy statute has nothing to do with mere expressions of belief regarding the hereafter. It has to do only with acts and practices in this life. In Tonkray vs. Budge, 14 Idaho 621, 654, 95 Pac. 26, page 36, the Supreme Court of Idaho held that the Constitutional prohibition of polygamy relates only to this life and to the practices in this life:

> "Now, it was evidently the intention of the convention to prohibit more than one celestial or 'time and eternity' marriage, as well as to prohibit more than one terrestrial or 'time only' marriage. But the prohibition on the celestial or patriarchal marriage is only intended to extend to the same period of time and to the same extent as the prohibition on the time marriage, namely, to this life. Constitutions and statutes are drafted and adopted for the government of man, and the regulations of their conduct in a civil and temporal government of human beings in this life. Constitutions and statutes care nothing about what men believe with reference to a future existence. Indeed they intended in this American Union to protect a man in believing anything he wants to believe with reference to the future. They do not deal with beliefs or with acts and practices. They protect any man in believing anything he wants to believe with reference to the future, but they prohibit him from acting or practicing anything in any manner contrary to good morals or the public weal as described by the laws of the land. As stated by Chief Justice Waite in Reynolds vs. U. S., 98 U. S. 145, 25 L. Ed. 244: 'Laws are made for the government of actions; and, while they cannot interfere with mere religious beliefs and opinions, they may with practices.' "

In his assignment of error, counsel for the appellants contends that the Supreme Court of the state of Utah has decided (a) that one may not advocate the practice of a religious belief in the plurality of wives, (b) that one may not teach the practice of a religious belief in the plurality of wives, (c) that one may not counsel the practice of a religious belief in the plurality of wives, and so on throughout the assignments of error. We may search the opinion of the Supreme Court of Utah in vain in an attempt to find any prohibition against counseling or teaching any belief. The case is not concerned with what one believes, but with what one does.

Appellants are not now in a position to make any complaint about what the evidence in the case indicates. They have seen fit to bring before this Court in their transcript of the record less than 5% of the entire thirteen hundred pages which were produced at the hearing. If it is now their contention that there was insufficient evidence introduced at the trial to support the findings of the trial court as sustained by the Supreme Court, they are without the necessary record before this Court with which to prove it. This Court has already held in cast of Clune vs. U. S., 159 U. S. 590; 16 Sup. Ct. 125; that the claim that a verdict is against the evidence cannot be sustained in this Court unless all of the testimony upon the essential facts is presented to the Court. It is not surprising that the appellants should comb the record very carefully and bring before this Court only a small portion of the evidence. It is not surprising that they should want to omit from their transcript of the record the pages and pages of evidence which establish beyond a reasonable doubt that these defendants were engaged in a conspiracy not merely to teach a belief in polygamy but to advocate and encourage the present practice of polygamy. Counsel for the state have taken the position that until evidence is presented before this Court attacking the findings of fact of the Supreme Court of the State of Utah, these findings are conclusive. We have not felt it incumbent upon us to supplement the transcript of record as brought up here by the appellants. We believe the findings of fact by the Supreme Court of the State of Utah are correct and have relied upon the rules of this Court to the effect that unless the entire record is brought up, these findings cannot be attacked on the basis that there is insufficient evidence to sustain them.

Of all the alleged assignments of error filed in this Court by

the appellants, only one, No. (L), has any basis in the decision of the Supreme Court of Utah. Assignment of Error No. (L) is as follows:

> "It is held that an agreement to advocate, teach, counsel and advise other persons to practice polygamy is an agreement to commit acts injurious to public morals."

The Supreme Court of the State of Utah has so found. But again we repeat, the Supreme Court of the State of Utah has made no finding that it is against the law to advocate any belief, but merely that it is unlawful to advocate that others engage in a practice which is contrary to the law of the land. In order to sustain this statement, we quote from the decision of the Utah Supreme Court in this case:

> "Admittedly a person cannot properly be prosecuted for expressing opinions nor for mere belief and personal convictions, however peculiar or repugnant they might seem to others; however, conduct condemned by statute may not 'be made a religious rite and by the zeal of the practitioners swept into the First (or Fourteenth) Amendment.' Murdock vs. Pennsylvania, 319 U. S. 105, 63 Sup. Ct. 870, 873, 87 L. Ed. 1292; 146 A. L. R. 81; State vs. Barlow et al., 107 Utah 292; 153 Pac. (2d) 647.
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> "Statutes do not attempt to regulate religious beliefs, but conduct. Freedom of speech and religion are not unlimited license to do unlawful acts under the label of constitutional privileges. Expressions and the use of words may constitute verbal acts, words may ignite an inferno of mob violence. As stated by Mr. Justice Holmes, in Schenick vs. United States, 249 U. S. 47; 39 Sup. Ct. 247, 249; 63 L. Ed. 470: 'The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. It does not even protect a man from an injunction

> against uttering words that may have all the effect of force.' See also Gitlow vs. New York, 268 U. S. 653; 45 Sup. Ct. 625, 630; 69 L. Ed. 1138 when the court said: 'That a state in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare tending to corrupt public morals, incite to crime or disturb the public peace is not open to question.' * * *"

This language of the Supreme Court of the State of Utah is in harmony with the language of this Court in the case of Milwaukee Social Democratic Publishing Company vs. Burlison, 255 U. S. 407, 41 Sup. Ct. 352; 65 L. Ed. 704, where the court stated:

> "* * * Freedom of the press may protect criticism and agitation for modification or repeal of laws, but it does not extend to protection of him who counsels and encourages the violation of the law as it exists * * *"

If the Supreme Court of the State of Utah did not hold that it was unlawful to entertain or to express a belief no matter how repugnant to ordinary sensitivity such belief may be, what did the Court find in regard to the conduct of these defendants? Let us turn again to the language of the Supreme Court of the State of Utah in the case from which this appeal is taken:

> "* * * Contrary to the arguments of counsel, these particular defendants did not merely express beliefs and limit their remarks to mere academic discussions. It is true that they discussed theological topics at some of their meetings, but they also spoke about polygamy in such a way as to evidence the design to induce others to act and pressure was applied to several people. * * *
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> "Some of the men claimed in public that they had a right to perform polygamous marriages. They proclaimed that polygamy must be lived, one defendant saying that the law

makes no difference with them. One defendant declared that polygamy should be practiced at present; that public relief was instituted by the Lord for polygamy people and that they should get on relief and stay on relief. One defendant announced that it was the duty of women to find other wives for their husbands. Some also announced in meetings attended by persons not indulging in such practices, that no woman should prevent her husband from taking another wife and that she should go along with her husband or else step aside so that he could take another wife and that men should have the courage to act. At one of these meetings one Heber C. Smith, Jr., was made the specific object of remarks of various defendants.

"We cite this evidence of acts which tend to prove the agreement itself which shows a systematized plan to induce others to enter into the practice of polygamy in which scheme of advocacy a number of these defendants participated. Although as hereinbefore stated it is not essential to the existence of a conspiracy that the object of such conspiracy be actually accomplished, it would appear from the evidence that the efforts to induce Heber C. Smith, Jr., to practice polygamy were actually successful and that he and his family were among the victims of this conspiracy. There is some evidence htat Le Baron, with the aid of his wife and the arrangements made by Zitting induced a thirteen year old girl to be his polygamous wife. Zitting told her all she had to do was bear children * * *

"That this agreement contemplated actual inducements and solicitations directed at others is evident from testimony of a defense witness. She testified that defendant Hammon stated at one of the meetings that if a man is interested in a girl who is under age and he wants the girl he should go to the father and first obtain his consent. The witness stated that she understood this to relate to polygamy.

"What we have said hereinabove disposes of the argument

> that none of the defendants did anything except engage harmlessly in the expressions of religious beliefs. In fact some of these defendants willfully broke up the home of Helen Smith by persistently urging and inducing her husband to enter into the practice of polygamy. The solicitations which induced Heber C. Smith, Jr., to enter polygamy, all in opposition to the interest and desires of his wife, Helen Smith, and the consequent broken home from the divorce which followed are a complete answer to the contention that none of the defendants said or did anything which could be construed to be injurious to public morals. The claim that everything was on a voluntary basis and that the wishes of others were respected is unconvincing in view of the unrefuted evidence to the contrary. The contention that all of the defendants confined their activities to expressions of belief without interfering with the rights of others and without attempting to induce others to act is not sustained by the record."

As stated above, the only assignment of error made by the appellants which has any basis at all in the decision of the Supreme Court of the State of Utah is the assignment that the Supreme Court of the State of Utah held that an agreement to advocate, teach, counsel or advise other persons to practice polygamy is an agreement to commit acts injurious to public morals and is unlawful. Indeed the Court did so find; and if this Court holds that the Constitution of the United States preserves to an individual the right to teach, counsel and advise other persons to do acts which are contrary to the laws of the several states, then the conviction of the District Court and the opinion of the Supreme Court of the State of Utah should not be upheld.

In spite of the impassioned plea of counsel for the appellants that the First Amendment to the Constitution of the United States protects the right of individuals to practice polygamy if such

practice is done in conformance with religious belief, counsel for the state do not wish to labor this point. Whether the defendants in this case entered into the practice of polygamy or advocated the practice of polygamy because of a religious belief or because of the desires of the flesh, makes no difference whatever. This Court in the early case of Reynolds vs. the United States, 91 U. S. 145, held that the constitutional guarantee of religious freedom does not protect the right to practice polygamy. This holding was later reaffirmed in the case of Church of Jesus Christ of Latter Day Saints vs. United States, 136 U. S. 1, 10 Sup. Ct. Rep. 792. This position was recently reaffirmed by this Court when on April 2, 19455 the Court dismissed for want of a substantial federal question an appeal from a decision of the Supreme Court of the State of Utah upholding a conviction of certain individuals by a District Court within the state of Utah of the practice of polygamy. Barlow et al. vs. State of Utah, 324 U. S. 829; 65 Sup. Ct. 918; 89 L. Ed. 1396.

The chief distinction between this case and State vs. Barlow is that in the Barlow case each defendant was charged with and convicted of unlawful cohabitation. In this case the defendants were not charged with committing acts of unlawful cohabitation themselves, but with criminal conspiracy to induce other persons to violate the statutes prohibiting polygamy and unlawful cohabitation. The criminal conspiracy charged in this case necessarily involved overt acts committed in furtherance of this unlawful scheme. In this case, as in the Barlow case, the Supreme Court of Utah made it clear that the accused could not be prosecuted for mere expression of a belief and ideals but that the convictions that were upheld were sustained by proof of unlawful conduct. That Court in this ordered dismissal of the case as to all of the defendants except the appellants, not for lack of evidence

of some criminal conduct but by reason of insufficient evidence of a criminal conspiracy charge. As to the appellants here the Utah court observed:

> "Contrary to the arguments of counsel these particular defendants did not merely express beliefs and limit their remarks to academic discussions. It is true that they discussed theological topics at some of their meetings but they also spoke about polygamy in such a way as to evidence a desire to induce others to act and pressure was applied to several people."

If then, we are to accept, as we must, the position that the practice of polygamy is unlawful within the State of Utah, are we not then forced to agree that it is unlawful to advise or encourage others to commit an act which is in itself unlawful? The First Amendment does not protect a person in advocating, counseling or encouraging the commission of crimes. In the case of Gitlow vs. People of the State of New York, 268 U. S. 652, 69 L. Ed. 1139, in upholding the conviction of the appellant for publishing articles designed to incite others to criminal anarchy, the court stated:

> "It is a fundamental principle, long established, that the freedom of speech and of the press, which is secured by the Constitution does not confer an absolute right to speak or publish without responsibility whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. * * * That a state in the exercise of its police power may punish those who abuse this freedom by utterances inimicable to the public welfare, tending to corrupt public morals, incite crime, or disturb the public peace is not open to question * * * *."

Although Mr. Justice Holmes and Mr. Justice Brandeis dissented from the majority opinion in this case, they dissented merely from the application of the foregoing principles to the facts of the case and not from the principles themselves as laid down by the majority.

Counsel for the defense relies heavily upon the case of United States of America vs. John Barlow et al., in which the United States District Judge of the District Court of the United States for the District of Utah, Central Division, on the 18th day of March 1944, granted the defendants' motion to quash an indictment charging the defendants with conspiracy to commit an offense against the United States Government.

The defendants in that case were charged with a conspiracy to place obscene matter in the mails. The matter complained of was the publication "Truth," the publication of which is also one of the overt acts alleged in this case. In the Barlow case, the United States District Court held that a magazine advocating the practice of polygamy is not an obscene, lewd or lascivious book or pamphlet within the meaning of the United States Statutes, and that the mailing of such publication was therefore not properly the subject of a criminal prosecution. Counsel for the state in this case disagree with the holding of the United States District Judge. However, we do not feel that it is at all controlling in this case. In fact the language of the court in quashing the indictments as set forth in the memorandum of opinion of the court, which is quoted in full in the transcript of record in this case, clearly indicates that his holding would not be applicable to the case now before this Court.

In its opinion, the court stated as follows:

"It is quite natural that when the Congress forbade plural

> marriages and the Church agreed to submit to those laws many of the followers of the Mormon faith felt that they could not conscientiously and sincerely change their beliefs in the face of what they considered the direct command of God to the contrary. The Constitution of Utah prohibits polygamy or plural marriages. It might well be said that any prosecution for violation thereof under our theory of government is purely a local matter for the state rather than the federal government in the absence of the widespread violation of the law."

While a publication encouraging the practice of polygamy may not, within the contemplation of the federal law, be obscene, lewd or lascivious, the fact remains that according to the standards of present day society it is immoral. The federal judge did not have before him the evidence which is present in this case, of broken homes and of girls who were hardly more than children forced into marriages with older men. In his opinion the federal judge implies that this group in practicing polygamy is merely continuing the practice of the Mormon Church, which they regard to be commanded of God. The evidence indicates that the Mormon Church itself abandoned the practice of polygamy at the time of the Manifesto, more than half a century ago, and that this group is a group that has begun the practice of polygamy in relatively recent years. Counsel of course cannot look into the minds of the defendants in this case to determine whether or not they are practicing this principle because of what they believe to be a commandment of God or because of baser motives. Regardless, however, of the motives of the individuals in carrying forward the conspiracy to violate the polygamy laws, it cannot be denied that this practice, if continued unchecked, will lead to a breakdown of the moral standards and practices of the community. So far as the laws of the state of Utah are concerned,

a polygamous marriage is not recognized at all. A man who already has one wife and takes another wife is guilty of adultery if he engages in sexual relationship with her, and the woman is guilty of the crime of fornication. Can it be successfully argued that to encourage persons to engage in practices which the law recognizes as adultery and fornication is not an offense against public morals? The Supreme Court of the State of Utah during territorial days held in the case of People vs. Hampton, 4 Utah 258, 9 Pac. 508, that a conspiracy to keep a house of prostitution is an indictable offense. In the case of State vs. Wilson, 28 S. E. 416, 129 N. C. 650, the Supreme Court of the State of North Carolina held it to be criminal to enter into a conspiracy to procure sexual intercourse with a woman through a pretended marriage. What more is this than a pretended marriage? So long as we are to recognize the validity of the law prohibiting polygamy, we cannot say that it is not contrary to public morals to encourage the practice of polygamy.

This Court has held in many cases that before freedom of speech may be suppressed, the particular speech at which the suppression is aimed must present a clear and present danger to established government. However, the Court also stated "this court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be present." Whitney vs. California, 274 U. S. 357, 71 L. Ed. 1095, Bridges vs. California, 314 U. S. 252, 86 L. Ed. 192. Certainly it would not be necessary for a person to advocate overthrowing the government in its entirety before an utterance could be held to present a clear and present danger to existing government. Lawful governments are built upon law, and anything which encourages violation of this law presents a threat to that government. Certainly there is a clear and present danger to existing

government when a person openly advocates that another person commit a felony, which is just what these defendants in this case have been doing.

Let us take the comparison used by this Court in the Reynolds case, supra. Suppose instead of believing in the practice of polygamy, this group of defendants now before the Court believed that the laws of God require religious organizations to make human sacrifice. Suppose, further, that in their church meetings they exorted those present and within their hearing to go out on the streets of the city, select a likely looking victim and bring him into the meeting for the purpose of taking that victim's life to appease the imagined will of God. Would it be said that these utterances did not offer a clear and present danger to existing government? And yet the practice of polygamy is not less a felony under the laws of the state of Utah than is the commission of the crime of murder.

Suppose a group of modern Fagins were to conspire together for the purpose of soliciting juveniles and instructing these juveniles in the methods of the commission of crime and were to urge the commission of these crimes on their charges. Could it be said that the words uttered by these individuals held no present or imminent danger to established government? And yet here we have a group of individuals advocating the practice of polygamy, which is a felony just as larceny and robbery are felonies. Many who listened to their words and were led into this practice were juveniles. Once we have held that the state has the power to prohibit the practice of polygamy and to make the practice of polygamy a crime, then the practice of polygamy is placed upon the same basis as any other crime; and one who encourages, aids or abets the practice of polygamy is placed upon the same basis

as one who encourages, aids or abets the commission of any other crime. If we are to allow the individuals to advise and encourage the practice of polygamy, then, by the same standards, we must allow individuals freedom of speech to advise the commission of any crime. If this is permitted can it be denied or even doubted that a clear and imminent danger to government exists?

CONCLUSION

In spite of efforts by counsel for the defense to place the halo of religion around the activities of these defendants, the cheap, immoral and shoddy character of their activities stands out clearly in the evidence presented in the case. Counsel states that what these people were doing cannot be wrong or immoral because of the fact that the descendants of polygamous marriages in the early Mormon Church have turned out to be distinguished members of the community. What does this prove? Alexander Hamilton was an illegitimate and yet rose to occupy honorably one of the highest offices in this land, but is that an argument for promiscuous sexual relations? The laws of genetics have no relationship to the laws of morality. These individuals have chosen to follow a pattern of life contrary to the moral standards and the laws of the state in which they live. Not only do they follow these practices themselves, but even worse, they try to force them upon other individuals. They are not being persecuted for a religious belief. Again counsel for the state repeat: Let them believe what they will and the state of Utah will make no effort to stop them, but when they attempt to force not only their beliefs but their practices upon others, then it becomes the concern of established government.

The appellants now before the Court have been convicted

in a fair and impartial trial of a conspiracy to carry on acts contrary to good public morals and acts which threaten the very existence of organized government. Their conviction should be sustained.

Respectfully submitted,

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Assistant Attorney General

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 60

JOSEPH WHITE MUSSER, GUY W. MUSSER, CHARLES FREDERICK ZITTING, ET AL.,
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THE STATE OF UTAH

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

SUPPLEMENTAL BRIEF OF RESPONDENTS

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To the Honorables, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

At the suggestion of the Court during the argument of the above entitled case, counsel for the state of Utah is herewith submitting its supplemental brief covering only

the question of whether or not the Utah conspiracy statute under which the above named appellants were convicted is so broad, indefinite and uncertain as to be in contravention of the Fourteenth Amendment of the Constitution of the United States of America. In submitting a supplemental brief on this point counsel wishes to urge that the point not be considered by the Court at all in determining this case. The point was not raised in the trial court, in the Supreme Court of the state of Utah, nor in this Court either by assignment of error or by argument in the appellant's brief until mentioned from the bench by Mr. Justice Jackson after argument on the case had started. Section VI of Rule 27 of this Court provides in part:

> "Errors not specified according to this rule will be disregarded save that the Court, at its option, may notice a plain error not assigned or specified."

While undoubtedly the Court may under the above rule, at its option, consider this particular point, counsel wish to urge that the fundamental equities of the case require that it do not.

Certainly the trial court and the Supreme Court of the State of Utah should not be reversed in a case on a point on which they have never been called to pass. If this Court does elect to pass upon this matter, counsel suggests that the proper procedure would be to reset the case for oral argument.

THE UTAH CONSPIRACY STATUTE IS NOT UNCONSTITUTIONAL BECAUSE OF VAGUENESS, INDEFINITENESS OR UNCERTAINTY.

Section 103-11-1, Utah Code Annotated 1943 under which the information in this case was drawn provides as follows:

> "If two or more persons conspire:

(1) To commit a crime; or,

(2) Falsely and maliciously to indict or convict another for any crime, or to procure another to be charged or arrested for any crime; or

(3) Falsely to move or maintain any suit, action or proceeding; or

(4) To cheat and defraud any person of any property by any means which are in themselves criminal, or by any means which if executed would amount to a cheat, or to the obtaining of money or property by false pretenses; or

(5) To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice or the due administration of the laws; they are punishable by imprisonment in the county jail not exceeding one year, or by fine not exeeceding $1,000."

According to the terms of the Information the crime is charged specifically under Subsection 5 of that statute. However, the facts as alleged in the Information and the facts as established by the evidence are sufficient also to bring the acts of the defendants within Subsection 1, which holds that it is criminal conspiracy for two or more persons to conspire to commit a crime. Section 103-51-1, Utah Code Annotated 1943, provides as follows:

"Every person who has a husband or wife living, who marries another, whether married or single, and any man who simultaneously, or on the same day, marries more than one woman, is guilty of polygamy, and shall be punished by a fine or not more than $500, and by imprisonment in the state prison for a term of not more than five years; but this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage shall have been absent for five successive years, and is not known

to such person to be living, and is believed by such person to be dead, nor to any person by reason of any former marriage which shall have been dissolved by a valid decree of a competent court, nor to any person by reason of any former marriage which shall have been pronounced void by a valid decree of a competent court on the ground of nullity of the marriage contract."

Section 103-1-43, Utah Code Annotated 1943, provides as follows:

"All persons concerned in the commission of a crime, either felony or misdemeanor, whether they directly commit the act constituting the offense or aid and abet in its commission or, not being present, have advised and encouraged its commission, and all persons counseling, advising or encouraging children under the age of fourteen years, lunatics or idiots to commit any crime, and all persons who by fraud, contrivance or force occasion the drunkeness of another for the purpose of causing him to commit any crime, or who by threats, menaces, command or coercion compel another to commit any crime, are principals in any crime so committed.

The information in this case charges that the defendants conspired together "to advocate, promote, encourage, urge, teach, counsel, advise and practice polygamous or plural marriage and to advocate, promote, encourage, urge, counsel, advise and practice the cohabiting of one male person with more than one woman and in furtherance and pursuance of said conspiracy and to effect the object thereof, did commit the following overt acts:" It is made a crime under the laws of the state of Utah for a person to practice polygamy. The statute of the state of Utah also makes guilty as a principal any person who advises and encourages the commission of a crime. Therefore, in charging

that the defendants conspired together to advise and encourage others to engage in the practice of polygamy, the Information has charged that the defendants conspired together to commit a crime and so there is a proper charge under Subsection 1 of the conspiracy statute as well as under Subsection 5 of that statute.

Certainly it cannot be maintained that Subsection 1 of the conspiracy statute is vague or ambigous. It makes punishable as a crime conspiracy to commit any crime. In order to determine just what a crime is under the laws of the state of Utah one has only to refer to the statutes of the state defining criminal actions. In this case the crime in question is polygamy. There is nothing uncertain or ambigous about Section 103-51-1, Utah Code Annotated 1943. It defines the crime of polygamy with great particularity and any person who can read and understand the English language is fully advised by the statutes of the state of Utah that for a person to marry again while he or she still has a living spouse undivorced is guilty of polygamy. Section 103-1-43, supra, clearly informs anyone that reads that statute that one who advises another to commit polygamy is, himself, guilty as a principal in the commission of the crime. With this in mind can it be doubted that Section 103-11-1, Utah Code Annotated 1943, fully advises any one that reads the same that they are guilty of the crime of conspiracy if they conspire together to advise and encourage others to enter into the practice of polygamy?

The Information does not specify that it is being drawn under Subsection 5 of the conspiracy statute. It merely alleges that it is being drawn generally under Section 103-11-1, supra, which includes Subsection 1 as well as Subsection 5. Let us assume that the Information, instead of reading "to commit acts injurious to public morals as fol-

lows, to-wit" had merely read "to commit the following acts, to-wit." Certainly then it would be a proper charge under either Subsection 1 or Subsection 5. In view of the fact that the allegations of fact contained in the information are sufficiently broad to charge a conspiracy to commit a crime, counsel respectfully urge upon the Court that the defendants were fully advised by the statutes of the state of Utah that it was unlawful to conspire together to urge the commission of the crime of polygamy and were fully advised by the Information as to the charge against them at the time they were brought to trial.

Let us suppose, however, that the charge is not properly laid under Subsection 1 of the conspiracy statute but is brought solely under Subsection 5. Counsel still urges that the conviction should be sustained in this case. At the time this case was argued before the Court it was suggested that this statute might fall within the holding of the Court in the case of United States vs. L. Cohen Grocery, 255 U. S. 81, in which certain provisions of the Lever Act were declared unconstitutional on the grounds that they were indefinite and uncertain. An important distinction exists between the case now before the Court and the Cohen Grocery case. The Lever Act was a federal statute. This Court, as the highest federal Court, was the final authority as to the interpretation of the Lever Act as well as the final authority as to whether such act was in contravention of the Constitution of the United States. In the case now before the Court we are concerned with a state statute and while this Court is the final authority as to whether or not such statute is in contravention of the Constitution of the United States, the Supreme Court of the State of Utah is the highest tribunal having the power to interpret a statute of the state of Utah. Therefore, in determining whether or not a

state statute is in contravention of the Constitution of the United States, this Court should consider not merely the language of the state statute standing alone but also the interpretation placed upon that statute by the highest court of appeal of the state.

This case falls not within the terms of the Cohen Grocery case but rather squarely within the holding of the case of Fox v. Washington, 236 U. S. 273. In the case of Fox v. Washington a statute in some respects similar to the Utah conspiracy statute was being challenged before this Court on the same grounds raised here. The Washington statute provided:

> "Every person who shall wilfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document, or written or printed matter, in any form, advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace or act of violence, or which shall tend to encourage or advocate disrespect for law or for any court or courts of justice, shall be guilty of a gross misdemeanor."

Certainly that statute is fully as broad, indefinite and uncertain as is the Utah conspiracy statute. However, in passing upon its constitutionality this court considered not only the terms of the statute but the interpretation placed upon that statute by the Supreme Court of the State of Washington. The language of the Court in this regard is as follows:

> "So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed; United States v. Delaware & Hudson Co., 213 U. S. 366, 407, 408; and it is to be presumed that state laws will be construed in that way by the state courts. We understand the state court by implication at least to have read the statute as

confined to encouraging an actual breach of law. Therefore, the argument that this act is both an unjustifiable restriction of liberty and too vague for a criminal law must fail. It does not appear and is not likely that the statute will be construed to prevent publications merely because they tend to produce unfavorable opinions of a particular statute or of law in general. In this present case the disrespect for law that was encouraged was disregard of it-an overt breach and technically criminal act. It would be in accord with the usages of English to interpret disrespect as manifested disrespect, as active disregard going beyond the line drawn by the law. That is all that has happened as yet, and we see no reason to believe that the statute will be stretched beyond that point."

In construing the Utah conspiracy statute, the Supreme Court of the State of Utah has used language strikenly similar to that quoted above in the case of Fox v. Washington. I quote from the decision on this case in the court below, recorded at 175 Pac. 2d 731:

"Article III of our State constitution prohibits plural or polygamous marriages. Statutes enacted pursuant thereto, Secs. 103-51-1 and 2, Ut. C. A. 1943, makes felonious both the practice of polygamy and cohabitation of a man with more than one woman. Such relations are regarded by the law as meretricious. Conduct which induces people to enter into such felonious meretricious relationships, is certainly conduct injurious to public morals. Defendants, however, contend that if a conspiracy could be charged for expression of beliefs and ideas, then every effort to change some obnoxious law or some objectional constitutional provision could be thwarted by a conspiracy charge. There is a vast distinction between advocating a change in the law by appropriate legislation, and urging people to commit acts in violation of the law. Advocating violation of law is not an equivalent of urging repeal of the law."

Counsel for the state cannot deny that Subsection 5 of the Utah conspiracy statute is so broad in its language that if interpreted in the fullest and broadest extent consistent with the meaning of the language contained therein would be in violation of the due process clause of the federal constitution. However, in so far as this case is concerned it has been interpreted by the Supreme Court of the State of Utah to extend only to the extent of encouraging others to enter into "felonious meretricious relationships." Certainly, as the Court points out, such acts are contrary to good public morals and it is inconceivable that the minds of fair and logical men could differ as to whether or not such conduct was actually contrary to good public morals.

Again counsel wishes to urge that this point be not considered in the decision of this case but that if it is considered, the case be reset for argument before the Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 60

JOSEPH WHITE MUSSER, GUY H. MUSSER, CHARLES FREDERICK ZITTING, *et al.*,
Appellants,

v.

THE STATE OF UTAH.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

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OCTOBER TERM, 1946

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THE STATE OF UTAH.

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

Preliminary Statement

This brief is submitted by the American Civil Liberties Union, an organization with whose principles and ideals this Court is more than familiar.

As *amicus curiae*, the Union expresses its opposition to the prosecution of these appellants as being in derogation of the First and Fourteenth Amendments to the Constitution. With the more particular aspects of the defense, the principal brief in appellants' behalf will concern itself.

A review of the testimony contained in the record before this Court demonstrates that the appellants assembled and

advocated by word of mouth and by publication the doctrine of the original Mormon Church, including the polygamy section of the "Doctrine and Covenants". The record is clear of any act of polygamy by any one or all of the defendants, nor is any act of polygamy charged in the original information.

ARGUMENT

The appellants have a constitutionally protected right to express and advocate a religious belief.

Stripped of legal niceties, we are concerned with this simple problem: whether the oral or written *expression* of a fundamental religious belief, the *practice* of which is admittedly criminal, can itself be declared a criminal practice, for which persons, to whom the shield of the Constitution is available, may be convicted and incarcerated.

The First Amendment provides in part:

> "Congress shall make no law respecting the establishment of religion nor prohibiting the free exercise thereof, nor abridging the freedom of speech or of the press. * * *"

The Fourteenth Amendment extends these prohibitions to the action of a State or an agency thereof.

> *Murdock* v. *Commonwealth of Pennsylvania,* 319 U. S. 105, 63 S. Ct. 870, 872.

This Court said in the *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 63 S. Ct. 1178:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty,

can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion. * * * If there are any circumstances which permit an exception, they do not now occur to us."*

In 1784, the House of Delegates of Virginia considered "A bill establishing provision for teachers of the Christian religion." This proposed bill was in line with many attempts of an earlier day to circumvent freedom of religion and to punish the holding of heretical opinions. This Court, in *Reynolds* v. *United States*, 98 U. S. 145, tells what ensued (at 163):

> "This brought out a determined opposition. Amongst others, Mr. Madison prepared a 'Memorial and Remonstrance', which was widely circulated and signed and in which he demonstrated 'that religion, or the duty we owe the Creator', was not within the cognizance of civil government. Semple's Virginia Baptists, Appendix. At the next session the proposed bill was not only defeated, but another, 'for establishing religious freedom', drafted by Mr. Jefferson, was passed. 1 Jeff. Works 45; 2 Howlson, Hist. of Va., 298. In the preamble of this act (12 Hening's Stat. 84) religious freedom is defined; and after a recital 'that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty', it is declared *'that it is time enough for the rightful purposes of civil government or its officers to interfere when principles break out into overt acts against peace and good order.'* In

* The Court also stated in *United States* v. *Ballard*, 322 U. S. 78, 64 S. Ct. 882, 886, in discussing unpopular religious teaching:

> "If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left to religious freedom."

these two sentences is found the true distinction between what properly belongs to church and what to the State."*

Thus, this Court, in the very case upholding a territorial statute making polygamy itself a crime, was careful to draw the distinction between the practice of polygamy and the advocacy thereof.

We are here concerned only with the advocacy of a religious principle which was once considered a basic tenet of the Mormon Church. Doubtless, the parents and grandparents of the Governor, Presiding Judge and Prosecuting Attorney in the State of Utah were once firm believers and, perhaps, practitioners of plural marriages. The requirements of our society brought that State into the Union with a state constitutional prohibition against such practices. However abrupt or sudden was this recasting of religious dogma, it can safely be assumed that the majority of Mormon church-goers accepted the constriction upon their belief; nevertheless, a minority refused so readily to accept the new imposition. The appellants are a part of that minority. Yet it must be apparent that only the times have created their disaffection. A generation ago they would have been advocating established religious dogma.

We submit that it is primarily with those who are out of step with the "general" point of view that our Constitution concerns itself. They above all else must be the recipients of its safeguards.

These appellants did not engage in nor have they been charged with engaging in polygamous activities. They were merely shown to have expressed a religious belief

* Emphasis added here and throughout the brief.

and advocated a religious practice. This Court has frequently upheld the right to speak, advocate or publish *political* doctrines where the attempt to place them in execution would properly result in governmental prosecution. In analogous fashion it should uphold the right to advocate a *religious* doctrine, the actual *practice* of which would be subject to prosecution. We are concerned with the distinction between the act and its advocacy. In a democracy, a world of difference stands between them.

> "Plainly a community may not suppress, or the state tax the dissemination of views because they are unpopular, annoying or distasteful. If that device were ever sanctioned, there would have been forged a ready instrument for the suppression of the faith which any minority cherishes but which does not happen to be in favor. That would be a complete repudiation of the philosophy of the Bill of Rights."
>
> *Murdock* v. *Commonwealth of Pennsylvania*, 319 U. S. 105, 63 S. Ct. 870, 876.

Similar changes in times and tenor should not permit persecution by prosecution. We do not advocate the protection of polygamy as a religious practice. That is a determination for the people and their legislative representatives to make.

We do urge, without qualification, that the act proscribed—polygamy in this instance—should be the crime of which the suspected accused is convicted, and not the advocacy, however rigorous, of such proscribed act.

To preserve our essential freedoms, a clear and sharp line must at all times be drawn between expression of a belief and the crime of conspiracy. Totalitarian states have so blurred the line that mere discussion between men has afforded grounds for a charge of conspiring

against the state. To confuse criminal conspiracy with open advocacy of principle is to open the door to criminal prosecution whenever unpopular opinions are honestly expressed. And to prosecute such expression of opinion is to lay the cornerstone of the "police state."

It is now a firmly fixed axiom of this Court that any suppression of opinion or belief is to be countenanced under our Constitution only when the expression gives rise to "a clear and present danger" of action of the type a state is empowered to prevent and punish.

> *Schenck* v. *United States*, 249 U. S. 47; 39 S. Ct. 247 at 249;
>
> *West Virginia State Board of Education* v. *Barnette*, *supra*, 1182.

There is absent any basis for a finding that the mere utterance of beliefs by this religious minority presented in fact an immediate danger of general violation of the anti-polygamy law. This Court is, therefore, constrained to rule that the prosecution of these appellants was abridgment of their constitutional rights.

We submit, with this Court in *West Virginia State Board of Education* v. *Barnette*, *supra*, that

> "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard" (p. 1187).

CONCLUSION

The convictions of each of these appellants should be reversed and the appellants discharged.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 60.—October Term, 1947.

Joseph White Musser, Guy W. Musser, Charles Frederick Zitting et al., Appellants, v. The State of Utah. | Appeal from the Supreme Court of the State of Utah.

[February 9, 1948.]

Mr. Justice Jackson delivered the opinion of the Court.

The appellants sought review by this Court of a decision by the Supreme Court of Utah on the ground that the State convicted them in violation of the Fourteenth Amendment to the Federal Constitution. In the trial court a motion to dismiss the charge at the close of the evidence broadly indicated reliance on the Fourteenth as well as the First Amendment, and such reliance was indicated in requests for instructions. A preliminary motion to quash the information was stated in broad terms which it is claimed admitted argument of any federal grounds. Trial resulted in conviction and the Supreme Court of the State overruled all constitutional objections and affirmed.

On argument in this Court, inquiries from the bench suggested a federal question which had not been specifically assigned by defendants in this Court, nor in any court below, although general transgression of the Fourteenth Amendment had been alleged. This question is whether the Utah statute, for violation of which the appellants are amerced, is so vague and indefinite that it fails adequately to define the offense or to give reasonable standards for determining guilt. The question grew out of these circumstances:

Defendants were tried on an information which charged violation of § 103–11–1, Utah Code Ann. 1943, in that

they conspired "to commit acts injurious to public morals as follows: . . ." It then specified acts which amount briefly to conspiring to counsel, advise and practice polygamous or plural marriage, and it set forth a series of overt acts in furtherance thereof. The Supreme Court considered that the prosecution was under Paragraph (5) of 103–11–1 which, so far as relevant, defines conspiracy, "(5) to commit any act injurious to the public health, the public morals or to trade or commerce or for the perversion or obstruction of justice or the due administration of the laws . . . ."

It is obvious that this is no narrowly drawn statute. We do not presume to give an interpretation as to what it may include. Standing by itself, it would seem to be warrant for conviction for agreement to do almost any act which a judge and jury might find at the moment contrary to his or its notions of what was good for health, morals, trade, commerce, justice or order. In some States the phrase "injurious to public morals" would be likely to punish acts which it would not punish in others because of the varying policies on such matters as use of cigarettes or liquor and the permissibility of gambling. This led to the inquiry as to whether the statute attempts to cover so much that it effectively covers nothing. Statutes defining crimes may fail of their purpose if they do not provide some reasonable standards of guilt. See, for example, *United States* v. *Cohen Grocery Co.*, 255 U. S. 81. Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused.

When the adequacy of this statute in these respects was questioned, the State asked and was granted reargument here. Rehearing convinces us that questions are inherent in this appeal which were not presented to or considered

by the Utah Supreme Court and which involve determination of state law. We recognize that the part of the statute we have quoted does not stand by itself as the law of Utah but is part of the whole body of common and statute law of that State and is to be judged in that context. It is argued that while Paragraph (5) as quoted is admittedly very general, the present charge is sustainable under Paragraph (1) thereof which makes a crime of any conspiracy to commit a crime and that the sweep of Paragraph (5) is or may be so limited by its context or by judicial construction as to supply more definite standards for determining guilt. It is also said that the point, so far as this case is concerned, has been waived or lost because there was no timely or sufficient assignment of it as ground for dismissal to comply with state practice. We believe we should not pass upon the questions raised here until the Supreme Court of Utah has had opportunity to deal with this ultimate issue of federal law and with any state law questions relevant to it.

This trial was not conducted in federal court nor for violation of federal law. It is a prosecution by the State, in its courts, to vindicate its own laws. Our sole concern with it is to see that no conviction contrary to a valid objection raised under the Fourteenth Amendment is upheld. What the statutes of a State mean, the extent to which any provision may be limited by other Acts or by other parts of the same Act, are questions on which the highest court of the State has the final word. The right to speak this word is one which State courts should jealously maintain and which we should scrupulously observe. In order that the controversy may be restored to the control of the Supreme Court of Utah, its present judgment is vacated and the cause is remanded for proceedings not inconsistent herewith.

Vacated and remanded.

MR. JUSTICE BLACK concurs in the result.

SUPREME COURT OF THE UNITED STATES

No. 60.—October Term, 1947.

Joseph White Musser, Guy W. Musser, Charles Frederick Zitting et al., Appellants,
v.
The State of Utah.

Appeal from the Supreme Court of the State of Utah.

[February 9, 1948.]

Mr. Justice Rutledge, with whom Mr. Justice Douglas and Mr. Justice Murphy concur, dissenting.

I would make a different disposition of the case. I think a deeper vice infects these convictions than their apparent invalidity for vagueness of the Utah statute, first suggested on the original argument here, even if further construction by the Utah courts might possibly remove that ground for reversal. The crucial question, which the case was brought to this Court to review, is whether the state supreme court has construed the Utah statute to authorize punishment for exercising the right of free speech protected by the First and Fourteenth Amendments to the Federal Constitution.

The statute which appellants have violated provides that it shall be a crime for two or more persons to conspire "to commit any act injurious . . . to public morals." The opinion of the state supreme court construes these words to apply to conduct which induces people to enter into bigamous relationships and, more particularly, to the advocacy of the practice of polygamy. It held that the appellants were properly convicted because the evidence proved that they were parties to "an agreement to advocate, counsel, advise and urge the practice of polygamy and unlawful cohabitation by other persons."

Although the entire record of the trial has not been brought here, it is clear that some appellants urged certain

particular individuals to practice polygamy.[1] For present purposes I assume that such direct and personalized activity amounting to incitation to commit a crime may be proscribed by the state. However the charge was not restricted to a claim that appellants had conspired to urge particular violations of the law. Instead, the information as construed by the state court broadly condemned the conspiracy to advocate and urge the practice of polygamy.[2] This advocacy was at least in part conducted in religious meetings where, although pressure may also have been applied to individuals, considerable general discussion of the religious duty to enter into plural marriages was carried on.[3]

Neither the statute, the information, nor the portions of the charge to the jury which are preserved in the printed record distinguish between the specific incitations and the more generalized discussions. Cf. *Thomas* v. *Collins*, 323 U. S. 516. Thus the trial and convictions proceeded on the theory that the statute applied indis-

[1] "At one of these meetings, one Heber C. Smith, Jr. was made the specific object of remarks of various defendants." — Utah —, —, 175 P. 2d 724, 735.

[2] Although the information in terms charged a conspiracy to advocate *and* practice polygamy, the state court construed it as though it charged a conspiracy to advocate *the practice of* polygamy. — Utah —, —, 175 P. 2d 724, 730.

[3] "It is true . . . that at certain meetings speakers discussed polygamy, reading from the Bible and making the claim that the ancient polygamous marriage system was instituted of God, and that 'plural marriage is a law of God,' and that some individuals at these meetings declared that legislation prohibiting the practice of polygamy violates the spirit of the First Amendment to the Federal Constitution; that some speakers denounced officials of the Mormon Church for excommunication of people for teaching or practicing plural marriage, stating that the leaders of said church have 'no divine authority' and that such church is apostate; and that some services were conducted as 'testimonial meetings' at which members of the congregation arose voluntarily to express their views on any subject, and to acknowledge gratitude to God." — Utah —, —, 175 P. 2d 724, 734.

criminately to both types of activity. This is made doubly clear by the fact that the state supreme court set aside the convictions of several defendants who had done no more than attend meetings, give opinions on religious subjects and criticize legislation.[4] By setting aside these convictions that court indicated that it did not consider every discussion of polygamy, or attendance at meetings where the practice is advocated, to be "an act injurious to the public morals." Such a limitation on the scope of the statute was unquestionably required by the Federal Constitution. But as I read the opinion of the state court, it did not make a further limitation also required by the First and Fourteenth Amendments. The Utah statute was construed to proscribe any agreement to advocate the practice of polygamy.[5] Thus the line was drawn between discussion and advocacy.

The Constitution requires that the statute be limited more narrowly. At the very least the line must be drawn between advocacy and incitement, and even the state's power to punish incitement may vary with the nature of the speech, whether persuasive or coercive, the nature of the wrong induced, whether violent or merely offensive to the mores, and the degree of probability that the substantive evil actually will result. See *Bridges* v. *California*, 314 U. S. 252, 262–263.

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[4] "If it were true that none of the defendants did anything other than to attend meetings as indicated above [see note 3 *supra*], expressing disagreement with some other denomination, criticizing legislation, and giving opinions on religious subjects, none of the convictions could be upheld. The right of free speech cannot be curtailed by indirection through a charge of criminal conspiracy." — Utah —, —, 175 P. 2d 724, 734.

[5] The court held "that an agreement to advocate, teach, counsel, advise and urge other persons to practice polygamy and unlawful cohabitation, is an agreement to commit *acts* injurious to public morals within the scope of the conspiracy statute." — Utah —, —, 175 P. 2d 724, 731.

It is axiomatic that a democratic state may not deny its citizens the right to criticize existing laws and to urge that they be changed. And yet, in order to succeed in an effort to legalize polygamy it is obviously necessary to convince a substantial number of people that such conduct is desirable. But conviction that the practice is desirable has a natural tendency to induce the practice itself.[6] Thus, depending on where the circular reasoning is started, the advocacy of polygamy may either be unlawful as inducing a violation of law, or be constitutionally protected as essential to the proper functioning of the democratic process.

In the abstract the problem could be solved in various ways. At one extreme it could be said that society can best protect itself by prohibiting only the substantive evil and relying on a completely free interchange of ideas as the best safeguard against demoralizing propaganda.[7]

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[6] "Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of law. Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them in execution, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom, and the purpose to disregard it must be evident when the power exists. If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation." Judge Learned Hand in *Masses Pub. Co.* v. *Patten*, 244 F. 535, 540.

[7] "We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors and especially when the law stands ready to punish the first criminal act produced by the false reasonings; these are safer corrections than the conscience of a judge." Excerpt of letter written by Thomas Jefferson to Elijah Boardman of New Milford, Connecticut, on July 3, 1801, quoted by Charles A. Beard, The Nation, July 7, 1926, vol. 123, p. 8.

Or we might permit advocacy of lawbreaking, but only so long as the advocacy falls short of incitement.[3] But the other extreme position, that the state may prevent any conduct which induces people to violate the law, or any advocacy of unlawful activity, cannot be squared with the First Amendment. At the very least, as we have indicated, under the clear-and-present-danger rule, the second alternative stated marks the limit of the state's power as restricted by the Amendment.

The Supreme Court of Utah has in effect adopted the third position stated above. It affirmed the convictions on the theory that an agreement to advocate polygamy is unlawful. The trial court certainly proceeded on this theory, if it did not go further and consider discussion of polygamy as injurious to public morals as well. Therefore, even assuming that appellants may have been guilty of conduct which the state may properly restrain, the convictions should be set aside. A general verdict was returned, and hence it is impossible to determine whether the jury convicted appellants on the ground that they conspired merely to advocate polygamy or on the ground that the conspiracy was intended to incite particular and immediate violations of the law. Since therefore the convictions may rest on a ground invalid under the Federal Constitution, I would reverse the judgment of the state court. Cf. *Thomas* v. *Collins*, *supra*; *Williams* v. *North Carolina*, 317 U. S. 287; *Stromberg* v. *California*, 283 U. S. 359.

[3] "But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on." Mr. Justice Brandeis, concurring in *Whitney* v. *California*, 274 U. S. at 376.

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